Office Supreme Court U. S.
FILED.
OCT 12 1891
JAMES H. McKENNEY,
CLERK.

2

SUPREME COURT

OF THE UNITED STATES.

Nos. 6, 7 and 16, OCTOBER TERM, 1890.

THE IRON SILVER MINING COMPANY, *Plaintiff in Error,* **6** vs. THE MIKE AND STARR GOLD AND SILVER MINING COMPANY.	
SAME, PLAINTIFF IN ERROR, **7** vs. SAME, DEFENDANT IN ERROR.	IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.
JOHN L. SULLIVAN, et al., *Plaintiffs in Error,* **16** vs. THE IRON SILVER MINING COMPANY.	

BRIEF

For Iron Silver Mining Company

ON RE-ARGUMENT.

ed

SUPREME COURT OF THE UNITED STATES.

Nos. 6, 7 and 16, OCTOBER TERM, 1890.

THE IRON SILVER MINING COMPANY, *Plaintiff in Error.* **6** VS. THE MIKE AND STARR GOLD AND SILVER MINING COMPANY.	
SAME, PLAINTIFF IN ERROR, **7** VS. SAME, DEFENDANT IN ERROR.	IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.
JOHN L. SULLIVAN, et al., *Plaintiffs in Error.* **16** VS. THE IRON SILVER MINING COMPANY.	

BRIEF ON BEHALF OF THE IRON SILVER MINING COMPANY:

On re-argument under an order of the Court, of which the following is a copy, to-wit:

"It is ordered that these cases be re-argued before a full court, and then as one case. And the attention of counsel is specially directed to the discussion of the following questions:

First. What constitutes a "lode or vein" within the meaning of sections 2320 and 2333 of the Revised Statutes?

Second. What constitutes a "known lode or vein" within the meaning of section 2333?

Third. In what manner must the existence of such lode or vein be indicated to enable the applicant for a placer patent to describe it, and tender the price for it per acre required by the government?

Fourth. Whether the existence of such lode or vein must be known, and its purchase applied for when the application is made for the placer patent, and whether a lode or vein will be excluded from the patent, which is discovered after such application and before the patent is issued?

Fifth. Whether evidence of the existence of lodes or veins in the immediate vicinity of a placer claim is admissible to the jury, as tending to show the existence of such lode or vein within the boundaries of the claim? and,

Sixth. Whether there was any legal evidence for the jury of the vein or lode claimed by the defendant in error in the first two cases, Nos. 6 and 7, or by the plaintiffs in error in the third case, No. 16?

Counsel of the parties are requested to produce on the re-argument models and diagrams showing the position and form of the placer claim of the plaintiff in error in Nos. 6 and 7, and defendant in error in No. 16, and the position in it of the alleged lodes of the defendant in error in Nos. 6 and 7, and plaintiffs in error in No. 16, and also of the tunnel alleged to run into the said claim, and also of the adjoining land so far as may be necessary to a full understanding of the questions involved."

The present brief is respectfully submitted as an addition to the briefs of counsel already before this Court, and not as a complete substitute for them. In re-stating however, under the form suggested by the order of the Court, namely, as answers to the six

questions which the Court has formulated, the principles believed to apply to the three cases to be re-argued, it has been necessary to repeat to some extent the reasoning already followed by former briefs; but the portions of such briefs not so repeated are not intended to be taken as superseded; and the Court is respectfully requested to allow them their due weight in its consideration of the questions involved, particularly with regard to any points upon which the present brief may be found lacking.

I.

What constitutes a lode or vein within the meaning of Sections 2320 *and* 2333 *of the Revised Statutes?*

This question should be answered first as regards Section 2320, not only because that Section precedes Section 2333 in the Revised Statutes and in the inquiry as framed by the Court, but also because Section 2333 explicitly refers to Section 2320 for a definition of its own meaning.

But an examination of Section 2320 shows that it must be construed together with Section 2322, since the two mutually explain each other. A preliminary inquiry is thus suggested as to the nature and force of these two sections, and the relation which they bear to the rest of the United States mining law, as contained in the Revised Statutes.

These Statutes, as is well known, embody, (so far as the present discussion is concerned) the provisions of the Act of Congress passed May 10, 1872, which took the place of the earlier act of July 26, 1866, relating to lode mining claims, and the Act of July 9, 1870, relating to placer mining claims.

Prior to the Act of 1866, digging for minerals on the public domain was a trespass, (See 2 How. 120, a case in which the defendant was held guilty of trespass in mining for lead upon the public land in Illinois.)

By various Acts passed prior to 1850, the public mineral lands in Missouri, Illinois, Arkansas, Wisconsin, Iowa and Michigan were offered for sale. These acts present no features of difficulty in construction or application. They are entirely in harmony with the general land-system of the Government, and are, one and all, simply measures for selling lands previously reserved from sale.

Meanwhile, the ownership of the United States in the mineral lands in and west of the Rocky Mountains was not asserted against the pioneers and prospectors who were overrunning and rapidly developing that vast and mostly unsurveyed region, and a system of possessory titles had grown up under local laws and customs, which was respected by State, Territorial and Federal courts.

Under this system mining titles upon lodes were held without any claim to ownership of the public land containing them. The use of the sur-

face for mining purposes accompanied the possession of a "claim" on the lode. The real "claim" was to the lode, and it was not even necessary to mark on the surface the boundaries of the tract required as an adjunct to the working of the lode.

The Act of 1866 was an attempt to recognize, legalize and, to some extent, regulate this system of possessory titles. That Act threw open the public mineral lands to free exploration and occupation; but it did not offer them for sale. At least, the patents issued under it by the Government were held not to convey such a title to the surface as would enable a patentee to eject intruders; and the Government in fact issued many such patents for overlapping tracts, upon the theory that they conveyed only an easement in the land. Nor did any patent, whatever the surface it described, convey the ownership of more than one lode. Finally, the Act of 1866 made no provision for any other kind of mineral deposit than a lode. (This omission was supplied by the amendment known as the Placer Law of July 9, 1870, by which all forms of deposit, excepting veins of quartz or other rock in place, were included under the term "placers," and made subject to entry and patent.)

The act of 1866 was thus clearly a departure from the general policy of the Government as to the administration of the public lands.

The Act of 1872 was a return to that policy. Instead of throwing these lands open to occupancy

merely, and selling portions of the mineral deposits they contained, together with certain easements in the land itself, it offered them for sale (Section 1 of the Act, identical with Section 2319 of the Revised Statutes), as the previous Act had not done, and it provided (Section 6 of the Act, identical with Section 2325 of the Revised Statutes) a method of obtaining "a patent for any land claimed and located for valuable deposits," in which no distinction is made between lodes and other deposits. These fundamental provisions of the Act of 1872 (now Sections 2319 and 2325) are the basis of the grant of every mining patent, and that grant would be, under these sections, valid as a conveyance of title to the land, though all the rest of the law had been repealed.

But Section 3 of the Act of 1872 (Section 2322 of the Revised Statutes) made a special provision in favor of the occupants of a certain class of tracts of public mineral land, namely, the locators of mining locations on any mineral vein, lode or ledge, situated on the public domain. This special grant is two-fold: first, the exclusive right of possession and enjoyment of the surface; and secondly, what may briefly be called, to avoid the unnecessary quotation of the familiar words, the extra-lateral lode-right.

But these grants are made, it will be observed, to the mere locator. He need not apply for a patent, nor take any steps toward such an application. He need not even cause his location to be

recorded, unless local regulations compel him to do so. See *Golden Fleece* vs. *Cable Cons. M. Co.*, 12 Nevada, 312; also *North Noonday* vs. *Orient M. Co.*, 1 Fed. Reporter 522; and compare Section 2324 Rev. Stat., which leaves to local regulation the "manner of recording," subject to certain requirements as to "all records of mining claims hereafter made." The Revised Statutes take for granted that such records will be made, and in fact they are generally required by local laws or customs; but in the cases above cited, there being no local regulation requiring a record, none was necessary. And it is clear that (unless some State, Territorial or local regulation exists to the contrary) the rights granted to a lode-locator who has placed himself within the scope of Section 2322 date from the act of location, not the moment of record.

Of the two special grants made to the lode-locator in Section 2322, as above described, the first becomes superfluous after the issue of a patent to him, if he proceeds under the law to purchase the tract of mineral land he has located. For if Section 2322 did not exist, the United States patent for land, issued under Section 2325, would unquestionably convey the "exclusive right of possession and enjoyment of all the surface included within the lines" of the tract located and patented.

The second special grant to the lode-locator, namely, the extra-lateral lode-right, would not accrue to him by virtue of a simple patent for land, even if

it were mineral land. But if he has legally acquired and maintained this right as a simple locator, it is confirmed to him in the grant of the patent, although the patent itself is not conclusive evidence of its extent, or even of its existence. For the patent definitely conveys the land only, subject to certain conditions; and adds to this grant the extra-lateral lode-right, whatever it may be, to which the patentee or his grantor may have become entitled by virtue of the original location. What was not obtained in this respect by the location is not recognized or granted by the patent.

On the other hand, the patent grants something not given by Section 2322, namely, the actual ownership of the land beneath as well as upon the surface. The exclusive right to the surface only, and to certain lodes under it, which is conferred upon the mere locator, does not include the absolute title to those parts of the ground under the surface which are not included in any lodes belonging to him. For instance, the possessor of a lode-location not patented cannot eject a party who is running a tunnel intended to cut into his lode at a great depth, though the said tunnel may be under the surface of his location, if it has not yet broken into his lode. For under Section 2322, he is entitled as a locator to nothing more than the surface and the lodes having their apexes under it, not to the ground between them. But if he had purchased his mineral land and recorded a patent for it, he could maintain an action of ejectment or trespass; and the burden of proof would be upon the defendant to show affirmatively his right to be in *another man's ground.*

Section 2322, then, and Section 2320 as its complement, confer and define certain special grants to a certain class of parties and upon certain conditions. This distinction made in favor of that class and not conceded to any other class, is not only a departure from the usual practice of this and all other civilized countries in the administration of land-titles; it is also without any foundation of natural right. There is no real reason in the nature of things that while public and private lands in all our states east of the Rocky Mountain region, containing deposits of gold, silver, copper and other valuable minerals, are sold and re-sold and successfully developed by mining without any "extra-lateral right," it should be a duty to confer this special and unique right upon a single class of occupants of the public land in the west. The course pursued by Congress in this respect was dictated solely by considerations of public policy. It was thought that this exceptional course would encourage the Western mining industry. The Act of 1872 which, while bringing the administration of the public mineral lands of the West, in all other respects, into substantial harmony with the general land system of the United States, nevertheless retained this exceptional feature, was appropriately entitled "An Act to Promote the Development of the Mining Resources of the United States." The obligation resting upon the Government is to keep the promises it has made to lode-locators. But there is no general principle in obedience to which the courts, construing these premises, ought to give the benefit of every doubt to this one favored class of occupants

of the public land, and against all other mineral or agricultural land-owners.

For, moreover, the extra-lateral right conferred upon lode-locators constitutes a condition to which the titles of all neighboring land-owners under U. S. patents, of whatever class, lode, placer or agricultural, are subjected. Section 2 of the Act of 1866, contemplating the grant of one lode only to a single patentee, concludes with the words "together with the right to follow such vein * * * to any depth, although it may enter the land adjoining, *which land adjoining shall be sold subject to this condition.*" The words here italicized do not occur in the Act of 1872 or the Revised Statutes; but they are not needed, for the said "condition" not only exists by virtue of Section 2322, but has been made in fact much more onerous. The owner of land purchased from the United States, whether mineral or agricultural, is now exposed to the extra-lateral rights not merely of a neighboring *patentee* (as under the Act of 1866) but of a mere locator, who is simply exploring, and may or may not intend to purchase his claim; and to such rights not merely on one located lode (as under the Act of 1866) but on any or all lodes of which a neighboring locator has secured the apexes, and which he may desire to test underground.

In justice, therefore, to all owners of land of whatever nature under U. S. patents, this special favor granted as a matter of public policy and not of inherent reasonableness or natural right to a certain class of occupants of the public domain should be strictly construed.

Section 2322 defines the class entitled to this special grant as "the locators of all mining locations * * * on any mineral vein, lode or ledge situated on the public domain," and provides that under certain conditions they shall be entitled to certain extra-lateral rights within certain boundaries. With these conditions and limitations the present argument is not now concerned. The immediate question is as to the meaning of the terms "vein, lode or ledge." It is very probable that these three words were employed in order to avoid a narrow, technical and scientific definition of any one of them. Outside of one or two attempts in the lower courts to establish subtle distinctions among them, they have been generally accepted as synonymous in their use in the Revised Statutes. The omission of the word "ledge" from Section 2320, for instance, means nothing, and the general definition given in the Eureka case, as sufficient to cover all three terms, namely, "any zone or belt of mineralized rock lying with boundaries clearly separating it from the neighboring rock," is perfectly satisfactory. All that Section 2322 requires is the existence of such a zone, and the location "on" it of a tract of the public land.

The "vein, lode or ledge" of Section 2322, then, must be so situated that these conditions can be fulfilled. For their full nature and meaning, we must turn to Section 2320. And this brings us to consider the first part of the first question suggested in the order of the court, namely,

1. *What constitutes a lode or vein within the meaning of Section 2320?*

This section treats exclusively of *mining claims.* It contains but four sentences. The subjective nominative of the first is "Mining claims." The subject of the second is "A mining claim." The subject of the third is "No claim." And the subject of the fourth is "The end-lines of each claim." There is nothing described in the section except *located mining claims*; and the only "vein or lode" contemplated in it is one upon which a location has been made.

Section 2322, not Section 2320, is the one which confers the extra-lateral right upon certain lode-locations. Section 2320 merely describes the locations. And it is significant, as will be seen below, that Section 2333 refers, not to a vein or lode, such as is contemplated in Section 2322, but to a "vein or lode, such as described in Section 2320"—in other words, a vein or lode *located.*

2. *What constitutes a "lode or vein" within the meaning of Section 2333?*

This second branch of the first question framed by the Court requires first an analysis of the language of the Section itself; and some considerations will be submitted afterwards, confirming the result of this analysis by showing that the scope and meaning thus determined for Section 2333 are reasonable, effective, and consistent with the general spirit and purpose of the Statutes; and also, that any other construction of the Section is not capable of a just, reasonable and consistent application to the actual conditions of the mining industry.

The language of Section 2333 is as follows:

"Where the same person, association or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty-cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof."

It must be remembered that this Section was not a part of the Act of 1866. It was enacted first in 1872, at which time a peculiar usage had grown up as to the term "lode" (and its synonyms "vein" and "ledge," which for brevity will be hereafter usually omitted). The history of this usage is instructive, and is abundantly attested by the records of the Courts. It may therefore fairly be introduced here as within general knowledge.

Under the miner's customs which prevailed up to the passage of the Act of 1866, a lode generally had

but one name, no matter how far it could be traced longitudinally. Thus the Comstock lode at Virginia City, Nevada, when it had once been demonstrated to be one and the same mineralized zone throughout, was called the Comstock lode, for a length of several miles. It was usual to number the successive claims along a given lode, as "No. 1, East" or "No. 1, West," the point of departure being the "discovery claim." And "extensions," as they were called, were located on the supposed continuation of a lode, without any new discovery of the lode within the "extension" claims. At the same time, the claim itself or the mine or the company formed to work it, might have a name of its own, different from the name of the lode.

The Act of 1866 practically required a fresh discovery for each new claim (not exceeding 3000 feet in length), and moreover, by forbidding more than one location by the same party on the same lode, removed all motive for locating so-called "extensions"; and under that Act the practice speedily grew up of naming each new claim as a new lode. It must be remembered that at that time the real claim was the lode, not a tract of land enclosing its apex. This usage survived the radical change of legal conditions wrought by the Act of 1872, and has continued even to the present day. According to it, the terms "lode" and "lode-claim" are employed indifferently, to mean the located claim. Thus, a single lode, running through a series of claims, receives a different name in each. For instance, the Stone, Rock, Dome and other claims of the Iron Silver Mining Company are

admitted to be separate claims, along the apex of one continuous deposit; yet they are known as the Stone, Rock and Dome *lodes* It is customary in legal documents, such as the certificates of locations, deeds transferring title, decisions of courts, and circulars and letters of the General Land Office, to speak of a lode-claim as a lode.

To give an instance from the record of the Mike and Starr case. On page 29, in the certificate of location of the Goodell lode-claim, the description refers to "the west center side stake of the Mike lode" "Corner No. 4 of Mike lode," "Corner No. 1 of the Thomas Starr lode," etc., the reference being not to the said lodes, but to lode-claims so named.

The same use of language may be found also on page 6 of the record, in the answer of the defendant; and on page 7 the said answer declares that "in said location of said claim the same was called the Thomas Starr lode."

This usage grew up, as has been explained, under the Act of 1866, according to which the claim was held to convey the *lode* and not the ownership of the *land*. It was quite natural that it should persist after the Act of 1872 had made the claim really a tract of land.

Now it will appear upon a close examination of Section 2333 that the terms "lode" and "lode-claim" are used throughout the Section interchangeably, and that in no case can the meaning be fairly taken to be anything else than a lode-claim.

In the first sentence of the Section, the term "vein or lode" is used three times, and the term "vein or lode-claim" once, as synonymous with it. For the

parties are referred to as "in possession of a placer-claim, and also a vein or lode included within the boundaries thereof." Obviously the same kind of possession is implied in both cases—possession, namely, by the location of a mining claim. Moreover, a lode-claim, which is a definite tract of land, may be "included within the boundaries" of a placer-claim; but a lode in the scientific sense cannot be known to be so included; since it may both in strike and in dip pass beyond those boundaries.

Again, the said vein or lode claim is to be paid for, with 25 feet additional on either side of it, at $5 per acre. Evidently it is contemplated as an existing, defined area, the extent of which can be calculated.

These considerations are sufficient to establish the conclusion that the "vein or lode" assumed to be in possession of the placer-applicant in the first sentence of the Section is a vein or lode-claim. But there is an additional proof, to which attention should here be called.

A lode may be miles in length. A placer-claim may comprise 160 acres, and need not be square. It may be, for instance, a mile long by quarter of a mile wide, or two miles long by one eighth of a mile wide. Consequently, a lode may run through a placer claim for a length of one or two miles; and if the first sentence of Section 2333 referred to a *lode* only and not a *located lode-claim*, a single party, say the first discoverer of a large and valuable lode, might secure to himself two miles of its length by surrounding it

with a placer-location, and then applying for a double patent under this Section. But by Section 2320, a lode-claim cannot exceed 1,500 feet in length along the course of the lode; and it is clearly not the purpose of Section 2333 to provide a way in which that prohibition can be evaded.

Again, suppose that the apex of a lode runs for 3,000 feet through a placer-claim; and has been taken up in two locations, one of which belongs to the placer-claimant, and the other to a second party. In this case, if Section 2333 refers to the *lode* only, the placer-claimant is not in possession of it. But if the reference is to a lode-claim, he can obtain under the section a patent for his placer including the grant of his lode-claim.

It is thus made clear that the Section so far refers to located lode-claims only; and it may be observed in passing, that the useful and equitable purpose of the first provision of the Section is incidentally revealed by this construction. It is intended, not to confer upon a party who may surround his lode-discovery with a placer-claim, a larger extent of the lode than he could get by a simple lode-location, but to enable him at small extra cost and at a saving of trouble to himself and to the Government to acquire the tract including his lode-location *without sacrificing the extra-lateral lode-right attached to the latter.*

The first clause of the second sentence is:

"The remainder of the placer-claim, *or any placer-claim not embracing any vein or lode-claim*, shall be paid for at the rate of two dollars and fifty-cents per acre, together with all costs of proceedings."

There is no ambiguity here. The section has provided for placer-claims including lode-claims of the same owners. It now provides for placer-claims including no lode-claims at all, and thus far it can have but one meaning—that of located claims, held by possessory title.

There is but one further category: that of placer-claims including lode-claims in the possession of other parties. Concerning these, the language is:

"And where a vein or lode such as described in Section 2320, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode-claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode-claim."

Here, also, it will be seen, the terms vein or lode and vein or lode-claim are apparently used as synonymous. That this is the real meaning of the clause follows from the structure and progressive thought of the whole section. It would not be reasonable to suppose, that, having employed these terms interchangably thus far, the law now suddenly makes a distinction between them. At all events, the qualifying phrase, "such as described in Section 2320," strongly corroborates the view here urged. For the lode described in Section 2320 is, as we have seen, a located lode, and no other. The descriptions of that Section are descriptions of *locations*.

We now reach the final clause of Section 2333:

"But where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof."

This is the one solitary instance in the Section in which the context does not absolutely force us to construe "vein or lode" to mean a located claim. And here it is a matter of indifference which of the two meanings we attach to it. For if no vein be known then of course no vein has been located; so the former meaning carries both. That clause is, however, clearly no more than the correlative of what precedes. It does not grant any more, in fact, than the law would grant without it. For instance, it must be construed in harmony with Section 2322, which grants the extra-lateral lode-right to lode-locators. No one will pretend that a placer-patent within the boundaries of which, at the time of application, or even at the time of issue, no vein or lode was known to exist, would cut off the rights of a lode-locator whose location included the apex of a vein dipping into the patented ground. The phrase "all valuable mineral and other deposits within the boundaries thereof," which forms the conclusion of Section 2333, cannot be held to include lodes having their apexes outside and in possession of lode-locators. The extra-lateral rights of such locators are unquestioned. But they affect the title to the patented placer-ground neither more nor less than if it were a farm.

But this last sentence of Section 2333 carries also the clear implication that when a placer-claimant has excepted from his application all "known lodes," then, as to the rest of this ground, it shall be deemed to contain no known lodes. This can only be practicable if the exception be of a definite tract,—namely, that of an actual location. In that case, the application is easy. The lode-location named and excepted is just so much land left out of the application and the subsequent grant. The nature of the patentee's title is not affected. He gets so much less ground. But under any other conditions, if a lode could be held to be known to exist, without having been actually discovered and located, the placer patentee could get no title at all.

II.

What constitutes a "known lode or vein" within the meaning of Section 2333?

It is not probable that a doubt could have been seriously entertained as to the interchangeable use of the terms "lode" and "lode-claim" throughout this Section, but for the employment in connection with them of the peculiar phrase "known to exist." It may be asked how a location could exist without being known to exist? And it may be said that the lode known to exist under this Section cannot be a located lode-claim, because the rights of the locator of such a claim are already protected by Section 2322.

These objections are sensibly weakened by a consideration of the actual facts of practice to which the statute is applied.

In the first place, as has already been pointed out, the Revised Statutes do not require a location to be recorded; and if the local regulations do not require a record, then none is necessary; and even if they do require a record, the location exists and may be "known to exist" before the record has been made. This distinction may prove of immense importance in practice.

Again, a location once recorded does not necessarily continue to exist. It may be abandoned or forfeited, in which case the land, lode and all, (if there be a lode) reverts to the public domain, as completely as though no location had ever been made.

The "existence," therefore, of a lode-claim, which is the fact described as "known" or "not known" in Section 2333, must be its actual validity at a given time; in other words, the legal possession of it by a locator or his grantee.

This fact may be known from public record, both of the location and of the annual performance of work thereon, as proved by the filing of the annual certificate. Such knowledge as that would not need to be brought home by other evidence to the placer-applicant under this Section. It would be public advertisement which he could properly be considered bound to know. Even if there were only a record of the location, and no public evidence as to the maintenance of the claim by annual work, the placer-applicant could not be permitted to infer that the

location was not known to exist. He would make that inference at his peril, and subsequent proof that it was in legal existence and force would deprive him of so much of his tract as it comprised.

But if the lode-locator had neglected to make any record, or do anything raising a legal presumption of a knowledge of the existence of his location on the part of the placer-applicant, then it is submitted that such knowledge should be brought home by direct proof to the placer-applicant.

In accordance with this view, the known existence of a lode, (meaning a lode-claim) in the meaning of Section 2333, is the existing validity of the said lode-claim as evidenced, either by the record of location, with or without public record of the annual assessment work, or in the absence of other legal proofs and presumptions, by direct proof that the placer-applicant knew the fact.

The second objection to this construction is that it would give superfluous protection to locations already protected by Section 2322. This point has indeed been mentioned incidentally by the Supreme Court itself, in *Noyes vs. Mantle*, which, together with other Supreme Court decisions involving more or less directly the construction of Section 2333, will be considered below. It seems best, for the sake of clearness, to present the view here maintained as if it did not involve any real or apparent divergence from the previous utterances of this Court. The amount of such real or apparent divergence will be subsequently indicated.

It is frankly admitted that if the meaning here maintained for Section 2333 (namely, that the lode, the existence of which it alludes to as known is a located lode only) could be shown to involve an entirely superfluous protection, already amply given by Section 2322 to located lodes, the force of the argument in favor of that meaning would be greatly weakened, if not entirely destroyed.

But this is not by any means the case. The declaration of the Supreme Court in *Belk vs. Meagher* (104 U. S., 279, 283)—to the effect that "a mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent"—is unquestionably and exactly true, not only as applied in that case, but also as a general proposition covering claims located according to Sections 2322 and 2320 (probably also as to placer claims, with a difference not necessary to be discussed in this connection) *provided* the words "perfected under the law" in this proposition be held, as they must be, to include in their meaning the fulfillment of all the requirements of the United States Statutes and of local regulations not inconsistent therewith, for the maintenance of the locator's rights. There are evidently the following differences between the rights of a lode-locator and those of a patentee of a lode location:

a. The locator owns the surface of his location, and certain defined portions of all lodes having their apexes within it. But he does not own any ground under the surface not included in any of these lodes. The patentee acquires all the rights of the locator,

and the full ownership of the ground besides (subject, of course, to certain easements and conditions, such as the extra-lateral lode-rights of others).

b. The locator must do a certain amount of work annually, and obey also all other legal local regulations, in order to maintain his possessory title; and failure on his part in these respects does not merely create an adverse lien upon his property; it instantly works on entire and irrevocable forfeiture to the United States, and his claim, though it may have been, the day before, property in the highest sense, is as open to re-location as if he had never existed. The next occupant takes title direct from the United States, and not by purchase, assignment or descent. The patentee holds, on the contrary, by a title free from these liabilities and responsibilities.

c. Besides the proper marking of the claim, and the performance of annual work, Sections 2325 and 2326 impose upon the locator another duty, the neglect of which works an irrevocable forfeiture of his title. Namely, in the case of an application by another party for a patent conflicting with the whole or any part of his claim, he is bound to file an adverse claim within the period of sixty days, during which the said application is publicly advertised according to Section 2325; and it is his duty under Section 2326 to make such adverse claim upon oath, and to show in it the nature, boundaries and extent of his claim; and also, within thirty days after filing it, to commence proceedings in a court of competent jurisdiction, and to prosecute such proceedings with reasonable diligence to final judgments. A failure so

to do, it is declared by Section 2326, shall be waiver of his adverse claim ; while Section 2325 declares that if no adverse claim shall have been filed within the period of advertisement, it shall be assumed "that no adverse claim exists ; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

A patentee on the other hand, is not bound to file a protest and begin a law-suit whenever anybody applies to the Government for some of his land.

There is no hardship or injustice in requiring this constant vigilance from the locator—least of all from the lode-locator, to whom as distinguished from all other occupants or intending purchasers of the public lands extraordinary favor has been shown in the granting to him, as a mere occupant, rights which begin at an earlier period and possess a larger scope than is usual in the administration of public land. The Government says to him in effect: "If you obey certain simple conditions as to the initiation and maintenance of your status as a locator, you may use this piece of public land as your own, dig in it, carry away what you dig, waste the estate without liability for damages, and finally abandon it as exhausted, if you see fit, or proceed, if you prefer, to purchase it and eceive a patent for it, carrying all the locator's rights and more too. And so long as you comply with the conditions of your possessory title, you will be protected in it as property in the highest sense. But you must remember that the United States cannot undertake to keep a record of your location unless by pro-

ceedings for a patent, involving official surveys, etc., you make such a record in the Land Department. If you prefer to go on under your possessory title, avoiding the cost of surveys and purchase and yet expecting the protection of the Government, you must watch your own property, give timely notice when it is threatened, and take immediate proceedings to get a judicial settlement of any disputed question. The Government must not be prevented from selling mineral lands and giving clear titles to parties who apply as purchasers, through inactivity on the part of those who have never made such application. If you come forward and establish your prior right it will be protected; otherwise it will be forfeited."

There is certainly no injustice in this. Nor does it involve hardship as to interferences between conflicting lode-claims. It is true that with respect to this requirement, the lode-locator holds his property on the condition of constant vigilance. If he wishes perfect security, so that he can go away or stay, work or not work upon his mine, read the newspapers or not, and repose in assurance of his rights, whatever be done or claimed by others, the way is open to him. Let him proceed to buy the land from the United States, and take a patent for it. Until he does that, he must watch his possessions. But it is not difficult for a lode locator to watch against conflicting lode-claims. Their surveyed boundaries must cross his lines somewhere; the operations of their proprietors can scarcely fail to be within sight from his shaft or tunnel; and their advertisements refer to points and bounds with which he is familiar.

The case is very different, however, when a large placer-claim is located so as to surround and include a lode-location. Here the lode-locator might get no adequate warning. Particularly if there were a design to rob him of his rights, the survey might be stealthily made, without attracting his attention; and the advertisement might not, by mentioning points in his immediate neighborhood, arouse his suspicions. Not a stake need be set where he could see it. Not a line need cross his lines.

Now Section 2333, contrued as referring to located lodes, protects the lode-locator against this danger. It says to him, "You must be on your guard against conflicting lode-claims; but you needn't worry lest you be surrounded by a placer-location. In that case, you will not be required to file your adverse claim. Unless the placer-applicant explicitly claims or disclaims your property, he will be held to have disclaimed it."

The placer-locator, on the other hand, is relieved from the necessity of much surveying, which would otherwise be necessary to fix on his diagram the position of all lode-claims within the area of his placer-claim. The two industries can go on peaceably side by side. The placer-claimant can simply ignore the lode-claimants; and they, on their part, need fear no injury from his operations.

In this connection, attention is called to the employment of the word "exists," in the last sentence of Section 2325, which declares that under certain circumstances (to wit, the failure of third parties to

make formal objection within the sixty days of advertisement), it shall be assumed "that no adverse claim *exists.*"

Section 2333, construed according to the view herein maintained fits this provision exactly, with an exception in favor of a single class of lode-claims, namely, such as have been located and exist within a placer-claim. It says with regard to these, that if they are known at that time to exist they shall not be assumed not to exist by reason of the failure of their owners to file adverse claims and bring suits. In such cases, and in such cases only, it puts the duty of the initiative on the applicant for a patent. It is his business, if he means to assert possession of such an included lode-claim, to describe it by metes and bounds and make formal application for it. Not till then is the adverse claimant to it bound to take the least notice of him.

The Section thus construed, has, however, a further effect of importance. The lode-locations existing within the placer-claim at the time of application for patent may be subsequently abandoned or forfeited. In that case, they revert to the public domain; they do not fall to the placer-owner. For they were so much land which he did not buy. Their boundaries, as they existed at the time of his application, marked, not a *condition* of his title but an *exception* from it. His rights thus limited are complete as to the ground not thus excepted.

By reference to the comments made below on the case of *Noyes* vs. *Mantle*, it will be seen that a

construction of Section 2333 which makes it refer to lodes, and not to lode-locations, actually deprives the lode-locator of the protection which this Section is calculated to confer.

If the lode, not the lode-location, were the subject of knowledge and disclaimer under Section 2333, we should have a condition of title rather than an exception from it. The placer-patentee would never know where an adverse title might be set up. One location might be made on the "known lode;" then after a while that location might be abandoned, and another, with different shape and position might be set up. Whichever way we turn, we are involved in uncertainties and contradictions unless we hold to the principle, which solves all difficulties, that the patentees of the United States buy land; that what they get is land; that what they disclaim or except is land.

The greatest source of evil in the administration of the Act of 1866 was the room which it left for vague and oral testimony, irregular and unprotected records, the varying developments of mineral work and the conflicting theories of mining experts, in determining the title of the miner. This evil it was one of the purposes of the Act of 1872 to remove. That Act, by substituting for the former grant of a lode with a land privilege attached, the present grant of a tract with a lode-privilege attached, brought mining titles into the same category with other titles conveyed by the government.

Now any construction of Section 2333 which makes it contemplate a lode not located makes it provide for the reservation out of the grant of a placer-patent, of precisely that sort of mining title which the Act of 1866 conferred and the Act of 1872 abolished as a nuisance: namely, a lode with a land-privilege attached, instead of a located tract of land, with certain special lode-rights attached. And this construction reopens the door to all the evils which infested the Courts prior to the Act of 1872. The record of the cases at bar affords a striking illustration of the manner in which hearsay testimony, popular rumor, relevant and irrelevant gossip, the geology of the whole neighborhood, the recollection of miners, are raked together and admitted by the court as "going to prove" the existence of a lode and the knowledge of it on the part of the placer-applicant. The Court even instructs the jury in the Mike and Starr case that, if they believe that Stevens knew, they may infer that Moyer knew; and thus the vast, shallow flood of inadequate proof is diluted once more by an utterly unwarrantable inference. It is impossible not to see that a construction of the statute permitting such a line of inquiry into what was generally known, believed, indicated by neighboring developments, etc. at a period long past; and what was the amount of knowledge possessed at the same period by a certain party, as indicated by remarks which he is remembered to have made—is a construction which invites the preparation and presentation of a class of testimony upon which the title to real estate ought not to depend.

III.

In what manner must the existence of such lode or vein be indicated, to enable the applicant for a placer-patent to describe it and tender the price for it per acre required by the government?

The peculiar language of Section 2333 furnishes an answer to this question. The Section defines but one case in which the applicant for a placer-patent may describe a "lode" within the placer-claim, and tender the required price per acre for it—namely, when the applicant is in possession of both the placer-claim and the "lode." As already observed in the discussion of the second part of question I, the kind of possession here intended seems clearly to be the same for both the objects of possession, namely, the legal possession or possessory title based upon a location. But it may be added here, that there is really no other way of getting rightful possession of a lode, except by the location of a lode-claim or by the legal acquisition of the rights of such a located claim, and (if the lode extend longitudinally more than 1,500 feet) the legal acquisition of the rights of the additional located claims which cover its whole length. For the full possession of any part of the length of a lode implies the right to that part throughout its entire depth, no matter who may have the title to the surface over it. In other words, the legal possession of a lode includes the extra-lateral lode-right; and this right nothing can give except a lode-location under Sections 2320 and 2322. The U. S. patent cannot give it, unless the patentee had it before, by virtue of a location.

Even the final clause of Section 2333, providing that "when the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all the valuable mineral and other deposits within the boundaries thereof," does not authorize or involve the granting of such rights as are signified in the possession of a lode. For example, let it be supposed that a placer patent has been issued for a claim in which no lodes, located or unlocated, are known or believed or surmised to exist, and that years afterwards, the placer patentee himself discovers the apex of a lode, lying parallel to one of his boundary lines and just within his tract, and that this lode passes on its downward course almost immediately out of the land he owns and beneath the surface of another. It cannot be reasonably held that his placer-patent gives him any right to follow it beyond his own boundaries; and it follows that the patent does not give him full possession of the lode in the sense of the Statute. Nor is there any way in which a double patent for placer-claim and lode-claim together, could grant the full lode-rights to the lode-claim unless such rights had been initiated beforehand under Section 2322 by a lode-locator. According to the view herein maintained, the word "lode" itself in this section can mean only a located lode, and the answer to question III would necessarily be, that the lode must be already located and the location must be in the possession of the placer-applicant. In other words, he should have the same ground of application as he would be required to have for a simple separate lode-patent; the object of the first part of Section

2333 being to facilitate and cheapen the issue of the two patents to the same party by putting them together in one proceeding and one resulting document, not to change the legal requirements prescribed by the law for either.

This view is again confirmed by the imperative form of the Section in this respect, which declares, not that the placer-owner *may*, but he *shall*, take the necessary steps to secure the double patent. It is therefore clearly implied that he *can* do so; and that the possession of the lode which he already has, is sufficient for him to base thereon an application for a lode-patent.

It must be remembered here that the placer-locator, as such, is not protected, like the lode-locator, in the possession of his surface-ground. There is nothing in the Revised Statutes to prevent prospectors from overrunning a placer-claim in search of lodes and locating them when found; nor would the earlier date of the placer-location at all invalidate their possessory titles as lode-locators, unless there should happen to be some local regulation, not inconsistent with the U. S. Statute, which had that effect. And it is questionable, whether any local regulations could legally give immunity of this sort to the possessory surface-occupancy of a placer-claimant. For as a general rule, with a single exception, no person can withdraw a piece of land from the public domain without at least giving some notice to the proper representative of the government. The government is entitled to know what and where the public land is. And it cannot be expected to keep itself informed

of the innumerable locations of all sorts recorded or unrecorded, abandoned or continued, which are made daily without notice to it. Until proceedings are taken for the purchase of a piece of public mineral land, beginning with formal applications and official surveys, it stands on all the government maps and records as unoccupied and for sale. And while it so remains, the United States does not undertake to protect the rights of a mere occupant, without declared intention of purchase, to the exclusive possession of the surface he may have staked out for himself.

The solitary exception to this general rule is furnished by Section 2322 for a single class only, namely, for lode-locations. These are withdrawn from the public domain by the mere act of location, without notice to the government, and, so long as certain conditions are complied with, they remain practically private property, though the U. S. Land Office may have no knowledge of the fact, and may carry them for years on its maps and records as unoccupied public land. When it undertakes to sell a piece of mineral land interfering with the prior rights of such a location, it may receive for the first time the notice of the existence of such rights, and after judicial determination of the fact, it may be obliged to decline the offer of an intending purchaser, in favor of a party who occupies the land without offering to purchase. All that it stipulates is, that it shall have timely notice of the locator's asserted right, and that, failing such notice, it may proceed without further regard to him.

Now this extraordinary concession to lode-locators, is nowhere granted to placer-claimants. Section 2322 confers it upon the former class in such intimate conjunction with the extra-lateral lode-right as to make it almost impossible to conceive the two as separated; and the extra-lateral lode right is clearly not granted to placer-claims. Section 2329, therefore, which makes placer-claims "subject to entry and patent under like circumstances and conditions and upon similar proceedings, as are provided for vein or lode-claims," cannot mean that placer-locations, prior to said proceedings, shall have the special rights conferred by Section 2322 upon lode-locations.

This view is confirmed (if confirmation be necessary) by the circumstance that the requirement of annual work, imposed upon lode-locators, is not imposed upon placer-locators—a distinction which the courts as well as the Land Office have repeatedly recognized. The placer-locator is often not even required to record his claim in districts or States where the record of lode-claims has been made obligatory (See, for instance, *Maxon* vs. *Wilkinson*, 2 Montana, 412.)

In a word, if there is less protection given to the mere locator of a placer-claim, there is also less required of him. And the reason for both facts lies in the peculiar nature of placer-mining proper, which is so dependent upon the annual supply of water from natural sources that sometimes in a dry season certain placers cannot be worked at all, while, on the other hand, in a wet season, placers of a different class, such as those located on the bars of large

streams, are inaccessible by reason of high water. The law has therefore wisely omitted to require annual work for the maintenance of possessory title, and left the conditions of such maintenance to be determined by local regulations. And this feature, originating in the conditions of placer-mining proper, has become applicable to all mining locations other than lode-locations, by reason of the inclusion under the head of placers, in Section 2329, of all forms of deposit except veins. (Thus, lime-quarries are located as "lime-placers" under this Section, and have, prior to proceedings to obtain patent, all the advantages and all the disadvantages, of ordinary alluvial placer-claims.)

But the withholding from the temporary occupant of a placer-claim the exclusive right to the surface has another reason in the same consideration as dictated the special favor shown to lode-locators in Section 2322, namely, the consideration of public policy, dictating the encouragement of lode-mining as a more permanent and regular industry, more valuable to the country, in the long run, as the nucleus of population and of other industries, and at the same time more in need of preliminary encouragement and protection. The temporary nature of ordinary placer-mining is well known. It has nowhere built up permanently prosperous communities, except where it has led to discovery and development of lodes (as it did in the famous instance of the Comstock lode). Consequently, while placer-mining might be freely permitted by a wise public policy, it would not be wise to permit

the mere temporary placer-miner to occupy a large area as if he owned it, and thus prevent the discovery and location of lodes within it. If he proceeded to make application as a purchaser for the land, the situation would be essentially changed; for as an owner of the property, his self-interest might be relied upon to lead him to discover and work, or sell to others, the lode-deposits within it. But while he manifested no intention to purchase, the government was justified in declining to protect him in such an ownership of the surface as would exclude prospectors who did not actually interfere with his licensed operations.

This throws a fresh light upon the provisions of Section 2333 which does not provide for any such inquiring into the date or origin of an existing lode-location within the placer as would be required if two lode-locators were in conflict, under the application for a patent for one of them. The only question it raises is, whether a lode-location exists at a given date (admitted by both parties in this case to be not earlier than the date of the application for placer-patent), and, if it does exist, whether it is or is not in the possession of the placer-applicant. If it is, he must name it, claim it, describe it and pay for it. If it is not, or if the possession to it is in dispute, he cannot steal a march upon the adverse claimant by simply saying nothing about it. In any case the date of the lode-location, as compared with that of the placer-location, plays no part. The controversy will turn upon the possession of the lode-location at a

date as least as late as the application for the placer-patent.

A question here arises, as to the case in which a placer-claimant actually in possession of a lode-location within his placer, makes application for a placer-patent without saying anything about his lode-location. It may be supposed, for instance, that he has found the lode unprofitable, and does not think the location worth holding, yet that, the annual assessment work having been performed, the location is still in force, and belongs without dispute to him. It need hardly be said that such a case is not likely to occur, because a lode-location carries extra-lateral rights which can be got in no other way, and the opportunity of getting these rights added, by the payment of a small additional sum, to those which the placer-patent would convey, is not likely to be lost by any locator who has sense enough to apply for a patent, and money enough to pay for it. But, supposing this course to be pursued, and the patent to be issued, without mention of the lode-claim, what would be the effect of Section 2333 under the circumstances?

The patentee might fairly be held to have forfeited simply the peculiar rights of the lode-claim, the possession of which he had disclaimed—that is, the extra-lateral rights, but to have acquired, nevertheless, by his patent, the title to the land. For his constructive disclaimer of the lode-claim, of which he is the undisputed owner, concerns only himself and the government, and amounts to no more than a

voluntary resignation on his part of the special rights which he might have obtained in connection with it. And, on this view, his right to the ground once covered by the lode-claim, if supported in any proceeding against a third party by the introduction of his patent from the United States, could not be impeached. But the government itself might commence proceedings to set aside the patent, on the ground that the patentee had disobeyed the imperative directions of Section 2333, under which he was bound to take the extra proceedings, pay the extra sum, and receive the extra rights, therein provided.

But when any third party either has or pretends to have an interest in the possession of the lode-location (whatever it be) contemplated by Section 2333, the omission on the part of the placer-applicant to mention the lode-location waives all his rights with regard to it, and constitutes an absolute and irrevocable exception of the tract itself, as well as the extra-lateral lode-rights to which it may be entitled from the grant of his patent. He cannot even, as it would seem, take the patent with a sort of mental reservation, conscious that it does not convey to him the lode-location, but intending, after he has made sure of the rest of his ground, to fight out the dispute, (if there be a dispute) as to the lode-location on its own merits. For his silence is a conclusive declaration that he has "no right of possession" in the lode-location; and it is hard to see on what grounds he could afterward maintain any contest whatever as to a title therein, claimed to exist at that time.

It will be seen at once that the situation described puts upon the placer-locator, if he desires complete protection, a much greater pressure than is felt by the lode-locator, to induce early proceedings for the acquisition of title by patent. Until he commences such proceedings, lode-locations may be made on his ground, which (while they may not be permitted to stop his actual mining operations) will ultimately deprive him of his possession of some of the surface.

Now, if, at the time when he commences proceedings for patent by making the proper application, accompanied by the description of his claim, there is within the claim a lode not located, but "known" in some sense to exist there; and if Section 2333 be held to require him, as in some sense "possessing" that lode, to take any steps regarding it which involve delay and exploration, and discovery and location, in order to pay for a certain area of land along the lode a certain price, on the penalty of losing otherwise some part of his placer-claim, it is submitted that the effect of such construction of the Section would work special injustice and hardship to the placer-locator, in view of the fact that, during the period of delay thus occasioned, he is not protected, as a lode-locator would be, in the exclusive possession and enjoyment of the surface within his boundary lines. This consideration is offered as an additional argument in favor of the construction of Section 2333 herein maintained.

But let it be assumed, for the sake of argument, that the preceding considerations are not sufficient to

establish this construction of Section 2333, and that, in fact, that Section refers to lodes unlocated as well as located. Still the answer to the third question of the Court must necessarily be, that a lode the existence of which is known within a placer-claim must, in order that the applicant for the placer-claim can describe it, and tender the price per acre for it required by the government, be so known that it can be located, that is to say, so that a tract of land including its apex may be laid out, and the area of this tract may be calculated, and the price for this area, at five dollars per acre, may be tendered to the government.

A collateral question is here suggested, as to the meaning of the word "thereof," in the phrase in Section 2333 concerning the payment, namely:

"Upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side *thereof*." Does this mean twenty-five feet on each side of the lode, or twenty-five feet on each side of the middle of the lode at the surface, or twenty-five feet on each side of the *claim*? The last is what it *says*, and it is a curious circumstance that this section, which employs the terms lode and lode-claim interchangeably throughout, and repeatedly uses the term "lode" where it can only mean a located lode-claim, should in this instance employ the term "lode-claim" where the word "lode," even if used in its strictest sense, or if used in the sense of the middle of the lode at its surface, would at least make sense. There could be no stronger illustration

of interchangeable use, of which the nature and history has been explained above.

It is not unlikely that, as a matter of fact, this clause was framed for insertion into the Act of 1872 under the impressions which had grown up under the Act of 1866, and without sufficient recognition of the fact that the new Act had made a lode-claim not merely a claim to the possession of the lode itself, with certain easements in the land, but a tract of land, with certain lode-rights attached to its possession.

It has been hitherto argued that the word "lode," in Section 2333, meant a lode location. It is not now necessary to argue that "lode-claim" means a lode not claimed, or a lode apart from its located claim. For the literal meaning of this provision, that "twenty-five feet of surface on each side thereof" shall be paid for by the applicant for placer patent may be easily accepted without assuming that "thereof," referring to the lode-claim, requires that lode-claim shall be construed as *lode*, apart from claim.

This will appear from the following considerations:

The Revised Statutes prescribe no minimum for the width of a lode-claim. Section 2320, the only one which mentions the subject, provides for a certain maximum length and width, and then forbids the limitation "by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights, existing on the 10th of May, 1872, render such limitation necessary." This prohibition is aimed at a

practice, not unknown in 1872, according to which the width of lode-claims was limited in many mining districts by local regulations, in order to give "more room" to prospectors. But whatever was the purpose of the prohibition, it does not prevent a locator from making a location as narrow as he may choose, provided he is not forced to do so by a "regulation" limiting the width. There are, as a matter of fact, many existing lode-locations in the West, which, by reason of neighboring locations prior in date (but not prior to May 10th, 1872) are narrower in parts than 50 feet—narrower sometimes than five feet.

Moreover, a lode-locator can at any time change the lines of his location by contracting them, prior to the official survey and application for patent. If he changed them so as to include ground not previously claimed, the change might affect the rights of others. But a reduction in the area of his location cannot possibly have this effect and is permitted without question. It would consequently be entirely practicable for a lode-locator, who also possessed a placer-claim, surrounding his lode-location, and who intended to apply for a double patent, including both, to first reduce the area of his lode-location by narrowing it to some absurd minimum, and then, if there were no provision in Section 2333 to prevent him, to obtain the extra-lateral rights upon his lode by the payment of a sum of money "per acre" which could scarcely be calculated on that basis without a smile. But Section 2333, taken in its literal sense, forces him to define and pay for at least a width of something over

fifty feet, by requiring him to pay for twenty-five feet on each side of his lode-claim.

Nor does this language, taken literally, enlarge the lode-claim itself. If it be supposed, for instance, that the original lode-claim was of the full width of 600 feet, permitted by Section 2320, and the placer-applicant, being in undisputed possession of the claim, did not choose to reduce it by narrowing it, as he might do, before applying for a patent, because it lay near one of his boundary lines, and he thought the possible extra-lateral rights on "all lodes" having their apexes within it were well worth a slight extra expenditure at the rate of five dollars per acre instead of two dollars and a half, he would have to pay, according to the literal construction of Section 2333, for an extra twenty-five feet on each side of "vein or lode-*claim*," that is, for 650 feet of total width, instead of 600—an increase of something over 8 per cent. But there is nothing in Section 2333 to indicate that he would thereby acquire a valid lode-location 650 feet wide, or, in other words, that he would acquire the right to follow beyond the sidelines of that increased area, lodes which might happen to have their apexes within the additional zone of 25 feet for which he had paid.

In other words, the placer-locator applying for a double-patent must pay for at least a width of 50 feet, no matter to what narrow limits he may have reduced his lode-claim, and this payment does not enlarge his lode-claim itself, which may still be of any width up to 600 feet which he may have decided to give it. And the width of his lode-claim, as described in his patent,

will determine what lode-apexes he will control, together with the extra-lateral rights attached to them.

The above construction of the literal meaning of Section 2333 is offered as entirely practicable and equitable. According to it, the placer-applicant must pay a small extra price for the convenience of getting a double patent by one proceeding.

It is worthy of notice in this connection, that any other construction of this part of Section 2333 involves no advantage whatever to the placer-locator who may avail himself of it, but a distinct and serious loss.

Suppose, for instance, that the possessor of a placer-location is the possessor of a lode-location of full size, included within it. He might naturally suppose that the first part of Section 2333 was intended to facilitate his acquirement of a title for both. But he finds on inquiry that the term "vein or lode-claim" does not mean his claim of 600 feet width, as permitted by law, but that it means the lode itself, and not the claim; and that he will be permitted to take only a width of 50 feet, instead of 600, and will be forced to sacrifice all the possible advantages of the lode-rights attached to apexes in the surrendered area. If he would retain his rights, he must first proceed to obtain a patent for the lode-location of full width, and subsequently apply for his placer-patent. But meanwhile his right to the surface of the placer is, as has been shown above, unprotected, (at least by U. S. Statutes) and any number of real or alleged adverse claims may be initiated.

It is submitted, in the light of this hypothetical illustration, that it cannot be the purpose of Section 2333 (at least, not if any other purpose can be reasonably deduced from its language) to reduce the width of a lode-location, legally made and perfected, from a possible 600 feet to 50 feet, simply because the owner of it is at the same time in possession of a placer-location surrounding it, and desires, under Section 2333, to include both in one patent.

Nevertheless, whatever construction of this provision may be adopted, it remains perfectly clear that the party possessing a placer-claim, and also a lode-claim within it, (whatever meaning may be attached to these terms) and desiring to obtain a patent, "shall," (not "may") include in his application the statement that the placer-claim includes such vein or lode, and shall pay for some area or other, comprising either twenty-five feet on each side of the lode, or else the area of his claim, plus twenty-five feet on each side of that, the sum of $5 per acre.

It must be evident that this payment cannot be tendered or accepted without a determination of the actual position and course of the lode, and its length within the placer-claim.

In the extremest possible case, on any possible construction of Section 2333, it must be admitted that the placer-locator must know where the lode actually is, at some one point, in order to guess, if he has not been able to trace, its probable course, and to estimate, at least, the area for which he is required to pay a double price to the government. Whether he is bound, under Section 2333, to delay all proceed-

ings for obtaining the patent which will protect his surface-ownership until he can adequately ascertain the precise course of the lode; whether it is a wise policy on the part of the government to discourage in such ways the desirable process of the transfer of the public lands to private purchasers, and whether the Statutes should be so construed, when another construction, equally legitimate, would be more consistent with obvious public policy, need not here be further discussed. Under any construction, the position and course of the included lode must be ascertained before the placer-applicant can comply with the requirements of the first part of Section 2333.

IV.

Whether the existence of such lode or vein must be known, and its purchase applied for when the application is made for the placer-patent, and whether a lode or vein will be excluded from the patent, which is discovered after such application and before the patent is issued?

This question is not affected by the preceding discussion. It concerns simply the date at which the status of the placer-applicant, with relation to the discovery or location of lodes within his claim, is to be finally determined. And the answer would be the same whatever might be held to be the nature of the existence of a lode of which knowledge or non-knowledge is contemplated by Section 2333.

The structure and language of this Section clearly indicate that the date of application for patent is the

decisive date contemplated throughout. The Section first requires the possessor of an included "lode" to make application "with a statement," etc. The date at which this double possession is contemplated and this statement concerning it is required, is unmistakably that of the application.

In the next place, the Section declares that where a lode is "known to exist," etc., an application for a patent for the inclosing placer-claim which does not include an application for the lode-claim shall be construed as a disclaimer of the latter. Evidently, the date at which the lode-claim here contemplated is "known to exist" and is constructively disclaimed, must be the date of the defective application.

There seems to be no escape from the conclusion that the alternative clause, "but where the existence of a vein or lode in a placer-claim is not known," etc., must refer to the same date. This clause is a part of the sentence, a preceding part of which has fixed the date of application. The sense would be scarcely plainer if the words were "but where the existence in a placer-claim of such a vein or lode as is described in this Section is not known as aforesaid at the date of application," etc.

This obvious meaning is also the equitable meaning of the Section. The placer-claimant, as has been shown, is not protected by the Revised Statutes in the exclusive possession of the surface he has located. In order to become a purchaser of the tract, he makes application for patent, accompanied with an official survey of the claim. His application is in substance a proposal to purchase whatever title the United

States has within those lines, and the subsequent proceedings and final issue of the patent have no other object than to ascertain the facts, as they exist when the application is made. Upon proof that the applicant has complied with the law, and that no prior obligation of the United States prevents the transaction, the full title of the government is conveyed by patent to the applicant. This title is confessedly subject to a condition in favor of the extra-lateral lode-rights of neighboring locations, whether these are senior or junior in date. It is also subject to certain rights of way and other easements, and to the regulations of local authorities as to the working of the mines. And finally, it is conveyed, in the case of a placer-claimant, by a grant excepting (in what sense, need not here again be argued) certain "lodes" known to exist, though no claimants of such lodes may have protested against the grant, as in the case of a lode-patent they would be bound to do.

It must be evident that the Government and the proposed purchaser of land, in such a case, must have at some time a definite understanding, and that this time is properly the moment when the application is made, stating exactly what the applicant desires to buy. Whether the surface tract thus made the subject of negotiations should be from the date of application considered as absolutely withdrawn from the public domain or not, as it would be from the date of location, if it were an existing lode-claim not contested, it must at least be held that after the com-

mencement of proceedings for its purchase, no new adverse rights, not then existing, could equitably be allowed to originate by reason of the discoveries of third parties within it.

This is peculiarly true with regard to such adverse claims as might arise under such a construction of Section 2333. For the claimants are not obliged to file protest, or to commence judicial proceedings. In order to illustrate this proposition fully, let a case be supposed in the highest degree favorable on all other points to the placer-claimant. Let it be supposed that Section 2333 is admitted to refer to located lodes only, and that, moreover, in all cases personal knowledge must be brought home to the placer-applicant of the existence of such located lodes within his claim, but that the time during which such knowledge is operative is extended beyond the date of application, and down to the date of entry or the issue of the patent itself. It would then be perfectly easy to nullify all the proceedings for patent, by serving notice on the placer-applicant, at the latest moment, that a lode had been discovered and located within his placer-claim. He would be obliged to go back and amend his application, or abandon it and make a new one, either claiming or disclaiming this lode-location, or else, by accepting the patent in silence, he would have surrendered by conclusive declaration perhaps twenty acres of the ground. And this might be repeated as long as he had any ground left to claim.

If Section 2333 covers lodes unlocated as well as located, then the case would be much worse, for

malicious opponents might simply give notice that they had discovered "lodes," without being bound to say in what part of the placer-claim.

It is not necessary to state further the innumerable ways in which a construction of Section 2333 permitting the recognition of lodes as "known to exist" which were not so known at the date of the placer-application, would work hardship and injustice, and reduce to a mere mockery the solemn transaction, with its public surveys, oaths and patent under seal, by which the United States professes first to ascertain and then convey for a money consideration a definite interest in a described tract of public mineral land.

This court in the case of *Iron Silver Mining Company vs. Reynolds*, (116 U. S., 687 and 124 U. S., 374) has fixed the proper construction as to date.

A date having been fixed, the final clause of Section 2333 is imperative, whether an alleged later discovery of a lode be dated one day or ten years afterward. That the date of the issue of the patent, which is fixed, not by any action or neglect on the part of the purchaser, but by the convenience and diligence of the executive officers of the government, should have any significance in this connection, is a proposition scarcely needing refutation.

V.

Whether evidence of the existence of the lodes or veins in the immediate vicinity of a placer-claim is admissible to the jury, as tending to show the existence of such lode or vein within the boundaries of the claim?

According to the construction of Section 2333 herein maintained the existence of lodes in the neighborhood of the placer-claim could not be pertinent to the primary fact to be established, namely, the known existence of a *located* lode within the placer-claim.

Nor would evidence of the existence of such lodes *outside* tend to show the existence of even an unlocated lode *inside*, in such a way as that its locality and course could be known and made the basis of a lode-claim, as explained under question II above. The most that such testimony could do would be to show a ground for the belief or expectation that a lode might exist within the claim. But this Court has already decided in *Mining Company* vs. *Reynolds*, (124 U. S., 374) that such opinion or belief is not the knowledge contemplated by the Statute.

In the cases at bar, the evidence of this sort offered and admitted was of the most loose and vague character. It consisted for the most part of mere testimony as to the existence of lode-locations near the placer-claim, without any proof that any of the lodes or alleged lodes covered by them continued on their course into, or to, or towards the placer-claim. The only definite assertions concerning any

lode which was even believed to enter the placer-claim, referred to the dip, not the course, of the lode. Thus, on pages 36 and 37 of the record in the Mike and Starr case, the witness, George Leonhardy, deposes, that in 1877 he was in the workings of the Rock and Dome lode-claims; that they had shipped a great deal of mineral from these workings, and that the mineral "seemed to run into the hill," towards the Wells and Moyer placer. On page 40, the same witness explained under cross-examination that he was talking about the "dip" of the mineral. In other words, this testimony and other testimony to similar purport, refers to a mineral lode, the apex of which, lying entirely outside of the Wells and Moyer placer, had been already covered with a lode-location, and the downward course of which was into the hill toward the placer-claim.

Counsel for the defendants in that case took some pains to have this vein described as a "blanket-vein," and the witness Leonhardy draws a distinction between "Blanket-veins" and "fissure-veins." But such a distinction, if it had either a scientific or legal existence, would have no effect in these cases. For the said blanket vein is either such a lode as is contemplated in Sections 2322 and 2333, namely, a lode upon which a lode-location can be made, or it is not. If it is, then the locator on the apex has the legal right of possession to all depths, and no prior or subsequent location on the neighboring surface can impair the title. If it is not, then it cannot be the kind of lode contemplated in Section 2333 but must be classed among the other kinds of deposits includ-

ed with placers in Section 2329, and expressly given to placer-claimants locating the tracts which contain them. In either case the defendant could not base any defence or counter-claim of title upon the existence of such a blanket-lode under the ground in dispute. Every particle of evidence concerning it is absolutely irrelevant under the proceedings.

VI.

Whether there was any legal evidence for the jury of the vein or lode claimed by the defendant in error in the first two cases, Nos. 6 and 7, or by the plaintiffs in error in the third case, No. 16.

It is assumed that this question refers to the lode claimed by the pleadings in each case, and not to any other lode, such as the so-called blanket lode, having its apex outside of the ground in dispute, concerning which evidence may have been admitted.

In the first two cases, which may be here considered practically as one case (the parties being the same and the pleadings, proceedings and assignments in error the same), the defendants set up as part of their answer the allegation that they were in possession of a location upon a known lode within the plaintiffs' placer-claim (in one case the Goodell and in the other case the Gardiner lode) which had been possessed and worked by them or their grantors ever since the location thereof in February, 1879, and that the said working and occupying of the said lode-claim constituted the trespass complained of by the plaintiff.

And for a further answer in these cases, the defendants alleged that they were the owners of a lode-location (in one case the Mike lode and in the other case the Thomas Starr lode—both of which alleged locations are shown by the diagram of the Wells and Moyer survey to lie wholly outside the said placer-claim: see printed record, pages 6 and 7, and the diagram opposite page 20), and that their work done upon the lode held by such outside location was the trespass complained of by the plaintiff.

If the defendants could have proved the location of a lode-apex in the Mike and Thomas Starr location and the passage of the lode in its downward course from such apex beneath the surface of the Wells and Moyer placer, they might have established their right to work under ground upon the said lode within the limits of the placer-claim, but they could not thereby have justified their entry upon the surface. For Section 2322, which grants the extra-lateral lode-right, especially withholds all authority under color of such a right, to enter upon the surface of such a claim of another owner or possessor.

In fact, the defendants offered on the trial no proof of the location or the record of the Thomas Starr and Mike claims. Consequently this part of their answer was abandoned. They did show by witnesses a belief in *a* lode (not the Goodell or the Gardiner, but the contact-vein or blanket-vein outcropping outside of the placer-claim) underlying that claim at considerable depth. But they did not offer

any direct proof that such was the fact, and if they had proved it, they would have made no defense. Consequently this evidence was improperly permitted to go to the jury.

The only lodes claimed by the defendants in these two cases were the Goodell and Gardiner lodes, and concerning these the evidence offered to the jury was of a remarkable character.

The witness John Hayes testifies to the discovery of four veins in the Mike tunnel (of which more will be said presently) but does not identify either as the Goodell or the Gardiner lode. He testifies further that he helped to stake the Goodell and Gardiner lodes, more than two years afterwards, and that he filed the location certificates, of which he was one of the signers. (In the question of defendant's counsel on page 53 of the printed record, these certificates are called re-location certificates, giving the impression that the discoverers of these alleged lodes had previously located and abandoned them. But in his cross-examination on the same page, the witness admitted that no attempt was made to locate a mining-claim there on the alleged discoveries of February, 1877, until 1879.)

The certificates claim, on each location, a length of 1500 feet, being 750 feet northerly and 750 feet southerly from the center of the discovery tunnel. But this discovery tunnel cannot have been the Mike tunnel. because the claims, as shown on the diagram, do not extend 750 feet in each direction from the center of that tunnel. On the other hand, the two

points marked on the diagram as the discovery shafts occupy the exact position described in the certificate. As they are according to the testimony (page 56 printed record) not more than eleven or twelve feet deep, they must be rather open cuts than regular shafts, and may perhaps have been called tunnels properly enough in the certificates, since they were mere diggings which, according to the manner in which they should afterwards be extended, downwards or laterally, might become either shafts or tunnels. But whatever they are called, they constitute the alleged discoveries upon which the claims were located; and it is surprising to find, upon the evidence of defendant's witness, Hayes, (page 56 of printed record) that they contain no discovery of any vein or lode whatever. What bearing this admission might have had upon the validity of the locations (defendant's application for patents to which, is the origin of the present proceedings) need not here be argued. As to the existence of a lode in either case, the absence of any sign of one in the discovery shafts has a double bearing. First, if any recognizable lodes were shown in the Mike tunnel, why should the locators go to another point for a new discovery? Secondly, the witness Hayes testifies (on page 57 of printed record) that the shafts were sunk where they "thought the lode existed where (which?) we cut in the tunnel." If this be true, then it follows that in digging upon the course of the seams they had cut in the Mike tunnel, the locators had failed to find them, and thus furnished evidence that they did not extend even to the middle of the located claims;

in other words, were in fact what they appeared to be in the only exposure ever made of them, *entirely insignificant surface seams, not worthy of a miner's attention*, and in no sense lodes of valuable mineral, such as the statute contemplates when it grants special privileges to lode-locators in order to encourage mining.

The evidence connected with the location of these claims is thus seen to be not only worthless to prove the existence of the Goodell and Gardiner lodes, but even tends to show that no such lodes do exist.

The same witness, John Hayes, is the only one who testifies to the fact and time of the alleged discovery of veins in the Mike tunnel. He gives the time of the first discovery as "about the 15th or 16th of February" 1877, and he gives no date whatever for the discovery of any other alleged vein, except that it must have been between January 13 and April 24, 1877. Since the contention of the defendants is that these veins being discovered before the date of entry of the plaintiff's patent are excepted from the grant thereof, and since the said date of entry is fixed by official record as February 21, 1879, it is strange that the only evidence of a fact on which the title to a large part of the tract which the plaintiff has bought from the government is asserted to depend, should amount to no more than the recollection of a single witness that a certain event happened about the 15th or 16th of February, and certain other events before the 24th of April following.

But as to the existence of the alleged veins themselves, the testimony is entirely inadequate. The most intelligent witness for the defendants, Mr. Bulkley, a trained mining engineer, says, under cross-examination, in answer to the question (page 60 of the printed record), "what kind of a vein is that you have described in the tunnel?

"I haven't described it as a vein. In speaking of it I used the term vein inadvertently once, because, while it possesses such characteristics of a vein as will be determined upon inspection, other necessary characteristics, I think, would have to be determined by analysis."

In the same connection, Mr. Bulkley remarks:

"The material which is enclosed in it—I have brought a piece with me—it looks very much as though it would carry silver, and possibly some gold, but to speak positively upon that point is more than I can do. I venture to say it looks like it, and most any miner will agree with me."

On page 62 of the printed record, and at the top of page 63, occur the following questions and answers, referring to the contact-vein or blanket-vein to which previous reference has been made:

Question (on cross-examination):

Do you not find the outcrop, top and apex of a large portion of that contact-vein which extends underneath the Wm. Moyer placer, in the Iron, Iron Hat, Bull's Eye and other claims along the west slope of Iron hill?'

A. "I am not prepared to say that you do."

Q. "It is outside of the William Moyer placer?"

A. "Yes, sir."

Q. "Wherever it is?"

A. "I judge that to be the case."

Q. "Mr. Bulkley, with reference to this seam that you have described and say you are not prepared to say whether it is a vein or not, is that any part or portion of this contact-vein that extends through that country that you have been testifying about?"

A. "Not properly; no, sir."

Re-direct examination by Mr. Reed.

Q. "Has it any connection apparently with the vein?"

A. "Almost positively; yes, sir."

The extensive contact-vein with which this seam is thus declared to have a connection, and which is believed by the witness to underlie the William Moyer placer at some depth not yet exposed, is elsewhere proved to be a vein of "iron" and lead carbonate, carrying silver. But the only testimony concerning any valuable mineral in any seam described in the Mike tunnel was that of the witness, John Hayes, who testified from recollection that he "got several colors of gold in it," and that his brother, an assayer, "had it assayed several times and got from a trace to three-quarters of an ounce of gold in it," (page 52 of printed record).

This clearly indicates no connection with an alleged vein of lead and silver ore below. And in the same connection, the witness testified as follows, (page 54, printed record):

Q. "Tell us whether or not there were placer mines near there before this."

A. "Before; yes, sir."

Q. "And gold dust had been taken out very near to where you sunk this shaft and commenced this tunnel?"

A. "Yes, sir."

Moreover, the evidence is clear that in all the alleged "assessment-work" done upon these locations, no attempt had been made, either before or after their location in 1879, to explore and develop the alleged veins at the only points where they are now asserted ever to have been seen. Mr. Bulkley's testimony and diagrams show these seams to be exhibited edge-wise in the walls of the Mike tunnel, just as they were the day after that tunnel had passed through them. The testimony of John Hayes shows that he and his associates drove the tunnel through four such seams, leaving each one behind, and continuing 200 feet in barren ground beyond the last seam crossed, and neither then nor at any other time taking the trouble to explore further these alleged veins; the only later exploration, if such it may be called, being the two discovery-shafts, which showed only the non-existence of such veins in the place where they were supposed to be. After the lapse of many years, and after the recording of locations upon the strength of these discovery-shafts, it is now attempted to prove the known existence of lodes of valuable mineral by oral testimony as to an earlier discovery, in consequence of which the discoverers made no location and

did no work, and by expert testimony as to the existence of seams, unaccompanied by any such proof as could have been furnished at once, without difficulty, of their mineral-bearing character.

The explanations offered by the witness Hayes are, that the tunnel was run to strike the Mike lode, already located, outside of the William Moyer placer; and that although he thought the vein he discovered by crossing it in the tunnel was worth locating, he did not locate it, because he was too poor. Neither of these explanations fits the circumstances. As to the first one, the witness testifies (page 53, printed record) that the tunnel was four hundred feet long when he quit, and the diagrams show that it had then not nearly reached the boundary of the Mike claim. He testifies also that assessment-work had been done on it since. Since it could not be hoped by this small amount of assessment-work to practically complete the tunnel as originally planned, it would have been easy to have put that work where it would have done more good, if any such place had been known within the tunnel; and the fact that it was done at the end of the tunnel plainly shows that the addition of half a dozen feet to the length of the tunnel in barren ground was preferred to a little exploration on alleged veins crossed in the tunnel, and proves that these seams could not have been considered mineral lodes at that time. The second explanation, that of poverty, affords no reason for this failure to explore, and is absurd even as a reason for making no record. For the witness declares (page 53,

printed record) that he had credit with Mr. Tabor to the extent of $1250 for groceries; and it is a notorious fact, universally recognized as characteristic of the western mining districts, that such credit (locally known by the quaint name of "grub-staking") is advanced to miners and prospectors on the express condition that if they discover lodes they will include the creditors among the locators. Even apart from such an agreement, it is absurd to suppose that a miner who can get $1250 would not be gladly assisted by his creditors to the extent of a couple of dollars to pay for the recording of a location upon a lode, which might add many thousands to his assets.

The statement of this witness that annual assessment-work was done on the Goodell and Gardiner lodes (page 57) does not apply to a period before 1879; and the statement in the brief of counsel for the defendant (page 17 of printed brief) that "as to the doing of the annual work by the discoverers of the veins, and as to the obvious ıbility of Mr. Moyer to have found out by the exercise of the slightest ordinary prudence, every fact (is) proven of record," is misleading.

Annual work done without a location is not required by the Revised Statutes, and the discoverers of these alleged veins made no location for two years after their alleged discovery.

The argument of counsel (page 8 of printed brief for defendants) that the Mike tunnel and the dump at its mouth were conspicuous objects when the

placer was located, and constituted a clear notice to Moyer and his surveyor of the existence of lodes, so far from having that force, proves the direct contrary. A tunnel started to reach the Mike lode, already located outside of the placer-claim, and which had been run hundreds of feet without discovering anything which its proprietors cared enough about to locate and record, constituted the strongest kind of evidence that no lode had been cut by it within the placer-claim. It was much stronger evidence in that direction than the entire absence of all exploration would have been. The surveyor would have been justified in saying that while, for all he could tell, undiscovered lodes might exist elsewhere in the ground he was surveying, there were none in that part of it, because it had been run through for hundreds of feet without exposing anything worthy of examination or location.

It is submitted, therefore, that there was in these two cases no evidence for the jury of the existence at any time, in 1877 or 1879, or now, of any such lodes within the defendant's locations as are contemplated by Sections 2322 and 2320, namely, lodes of valuable minerals having their apexes within these locations, so that they could be legally located for legitimate mining purposes.

In the Sullivan case, No. 16, the evidence as to the existence of a lode (admitted, if it did exist, to have been discovered after the issue of the Wells and Moyer patent) is still more meager and absurd. It

consists of the testimony of the witness John L. Sullivan (page 61 of printed record) that he and his associates began in 1883 a shaft upon a part of the Wells and Moyer ground, patented in 1879; that this shaft was sunk a hundred feet through "forest rock," with vein-matter on each side of the shaft; that there was at the bottom porphyry on one side and "contact" on the other; that by "contact" he meant decomposed porphyry carrying mineral; that one wall of this "vein" which was located as the Kit Carson, was porphyry, and the other wall had never been found. This is absolutely all the evidence going to show the existence of the Kit Carson lode. No assays, no expert testimony, no allegation that an ounce of mineral had ever been extracted from the shaft.

There is in this case, as in all the others, abundant talk about the great contact-lode or blanket-lode, supposed to dip under the Wells and Moyer placer-claim; and it is betrayed by the testimony that the Kit Carson shaft was really sunk to reach that lode. But that lode, as has been explained above, plays no part in these cases; and all evidence concerning it should have been excluded as irrelevant.

There was therefore in case No. 16 not a particle of evidence for the jury of the existence of a lode in the Kit Carson claim.

We desire at this point to consider with perfect frankness, certain utterances of this Court, which, taken by themselves, and taken as the deliberate

opinion of the Court after thorough consideration of the point involved, would appear to be against the construction of Section 2333 for which contention is herein made. We believe it can be shown, however, beyond doubt,

1. That in these cases the construction of this section herein contended for would have led to the same result in the decision of this Court.

2. That the construction apparently implied in the utterances of this Court was not necessary to its essential argument ; and

3. That the construction herein contended for, while it would not have changed the results of those cases, would harmonize the declarations of this Court, and also the provisions of the mining law, as no other construction would do.

The cases referred to are :

Sullivan et. al., vs. The Iron Silver Mining Co., 109 U. S. 550.
Reynolds et. al., vs. The Iron Silver Mining Co., 116 U. S. 687.
Iron Silver Mining Co., vs. Reynolds et. al., 124 U. S. 374.
Noyes vs. Mantle, 127 U. S. 348.
U. S. vs. Iron Silver Mining Co., 128 U. S. 673.

An analysis of these decisions, as brief as it can be made consistently with clearness, will now be offered in support of the foregoing propositions concerning them.

Sullivan vs. Mining Company :

In this case, when here before, Judge McCrary, in the Circuit Court, had sustained a demurrer, to defendant's answer on the ground that the terms "known

to exist" and equivalent phrases, in Section 2333, mean a lode-claim duly located before the placer application whereas, the defendants' location, as shown by the pleadings, was not made until afterwards. This construction of Section 2333 was precisely the one herein advocated. Nevertheless, this Court reversed the ruling and remanded the case for trial, remarking, however, that a determination of the meaning of Section 2333 was not properly involved. For the defense set up had followed the language of the statute. If true, therefore, it would be pertinent and sufficient, and the construction of the statute should not have been attempted in advance of further inquiry into the facts of the case.

Indeed, the answer sets up two separate defenses; first, the existence of a known lode, (in the terms of Section 2333) within the placer-claim; and secondly, their own lode-location junior to the patent-application. Now while the second defense taken by itself must be insufficient, it did not follow that the first was so, or that the two taken together might not be good. This did not follow, we say, even if Section 2333 refers to located lodes exclusively. For, as has been shown above, the lode-locations within a placer-claim existing but not mentioned at the time of the placer-application, are so many reservations of land from the grant of the placer-patent. If subsequently abandoned, they revert, not to the patentee, but to the United States. It was therefore perfectly competent, under the pleadings, for the defendants to prove that their lode-location, though made after the placer-application,

was made upon ground held at the time of that application, by some one else, and therefore reserved from the patent-grant. In other words, the defendants might possibly have presented under the pleadings a good defense under any of the proposed constructions of Section 2333; hence the adoption of one or another of these constructions was not sufficient to sustain the plaintiff's demurrer.

Reynolds vs. Mining Company:

In this case, the Company, plaintiff below, had brought a similar action to recover possession of mining ground within its patented placer-claim; but the defendants pleaded no title of any kind to the disputed ground; and the Court below charged substantially that as to such intruders, the plaintiff's placer-patent showed good enough title even to a "known lode" (whatever that might be) to give the right of recovery and possession.

The majority of this Court reversed that ruling, on the ground that the Company's title to the ground in dispute was either good or bad, and that plaintiff must recover on the strength of its title, not the weakness of its adversary's.

Chief Justice Waite dissented from this opinion, holding that as Section 2333 provides for the disclaimer of possession of a lode-claim, it is not operative where there is no lode-claim, but only a lode not claimed. This, so far as it goes, is the true construction of the Section, as herein contended; yet it does not follow, as the Chief Justice seemed to

infer, that the absence of a title in the defendant justified the Court below in practically directing the jury verdict for the plaintiff. On the hypothesis that Section 2333 means lode-locations and nothing else, any such lode-location existing at a certain prescribed time is simply never granted to the placer-applicant whose survey surrounds it. He has not a partial or a good enough or a *prima facie* or a superior title to it, but absolutely none at all. Consequently, there can be no such thing as a naked intruder upon his rights with regard to it.

It follows that the ruling of the Court below was erroneous under any construction of Section 2333, and the decision of this court would not have been affected by the adoption of either. In fact, this Court in the decision referred to, expressly disclaims the necessity or intention of inquiring into the meaning of the terms "known to exist."

Mining Company vs. Reynolds:

This is the same case as above, coming up on writ of error after a second trial below. In this trial, the Court below had substantially charged the jury that a belief on the part of a placer-locator in the existence of a lode within his placer-claim, and an intention, on his part, to secure by his placer-patent possession of a lode supposed by him to be included within his boundaries, constituted such a knowledge of the lode on his part as would work a reservation of it from his patent under Section 2333.

The view was sharply reproved by this Court, and the case was remanded. Undoubtedly this Court

employed expressions intimating or implying that it had in mind as the "known" lode of Section 2333, a lode merely, and not necessarily a located one. But the main subject of the decision was the nature and extent of the knowledge, and the proofs of it, required to bring a case within Section 2333. The Court indicated difficulties, and suggested various possible proofs; but all this was aside from its essential decision, namely, that whatever might be the knowledge of an existing lode or lode-claim, contemplated by Section 2333, it was not the sort of knowledge here alleged against the Mining Company's grantor, and made by the jury, under the instructions of the Court, the basis of a verdict for the defendants below. The construction of Section 2333, for which we have contended would have led *a fortiori* to the same decision on the appeal of this case.

In the above three cases, therefore, it may be confidently declared, this Court did not undertake to construe directly and fully the meaning of Section 2333, or to define its application. Although the Court may have used language incidentally assuming that lodes not located might be the lodes contemplated in the terms of that Section, it decided each case exactly as it might have done, had the other construction of the Section been in its mind; and it wisely and frankly gave warning at each utterance, that the main question must still be considered as open to a more comprehensive examination, when the occasion should demand it.

Noyes vs. Mantle:

In the fourth case, however, this Court went further, and there is in its decision of that case a single paragraph (not, as we conceive, essential to the decision) which contravenes in terms the construction of Section 2333 herein contended for.

This was a suit in equity to quiet title. The land in controversy was included in a patent issued to defendant below, appellant here, for a placer claim. Plaintiff claimed under a lode-location made and recorded more than six months prior to the application for the placer-patent, which did not notice the existence of such lode or such lode-claim, and defendant denied knowledge of the existence of the same. Certain questions were submitted to a jury, and on the trial the jury could not agree as to the fact of this knowledge, whereupon the Court held that proof of knowledge was not necessary under the circumstances. Judge Wade, of the Supreme Court, of Montana, who delivered this decision (5 Pac. Rep. 856), based it substantially upon three grounds:

a. A lode mining claim is the exact kind of lode referred to in Section 2333, the knowledge of which works the disclaimer provided in that Section.

b. Such a claim, if recorded, must be legally presumed to be known to exist, by reason of the formal public notice involved in the location and record.

c. Besides, the location of a lode claim creates an existing outstanding grant, and is a withdrawal from the public domain of the tract it covers.

The case having been appealed on exceptions to these rulings, this court sustained the court below, and, in so doing, unquestionably enforced both the spirit and letter of the statute, and the real equity of the case. In reading its decision, however, it is difficult to escape the impression that the language of Judge Wade, which was partly adopted and partly rejected, led the court to make use of expressions which it would not have employed upon a deliberate consideration and comprehensive statement of the principles involved. Of the three propositions laid down by Judge Wade, this court disapproved of the first, and entirely approved the other two; and whereas, the decision below apparently rested upon *a* and *b*, as its main supports, and advanced *c* as a collateral confirmation, showing that *a* and *b* were in harmony with the general spirit and purpose of other sections of the statutes, this court in its review of the subject, rejecting *a*, seemed to rest the case upon *c*, and yet proceeded to re-state *b* with approval, as though *b* also were a ground of its opinion.

The language of this court is as follows:

"The section can have no application to lodes or veins within the boundaries of a placer-claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law, are the property of the locatros, or parties to whom the locators have conveyed their interest. As said in Belk vs. Meagher, 104 U. S. 279, 283; 'a mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.' It is not, therefore, subject to the

disposal of the Government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them."

This, we submit, is equivalent to saying:

1. Lode-locations, such as are described in Section 2320, being already, under Section 2322, private property in the highest sense, cannot be meant by Section 2333, because they do not need any such protection as Section 2333, under that construction, would be supposed to give them.

Nevertheless, if such located lodes be referred to exclusively or inclusively, in Section 2333, then the knowledge of their existence on the part of a placer applicant need not be proved by anything more than the public record of their location.

3. Therefore, on either theory as to Section 2333, the prior lode-location in this case is good against the placer-patent; and the decision below must be sustained.

If this analysis of the decision in Noyes vs. Mantle be correct, it is possible, without disturbing the force and effect of that decision, to examine the first of the above propositions upon which it rests.

Is it strictly and unqualifiedly true that a lode-location is property in the highest sense? Only so long as the possessory title is maintained by obedience to the Revised Statutes and to local regulations not inconsistent therewith. Among the require-

ments of the Revised Statutes are the proper marking of the claim, the performance of the annual work, *and the filing, within a certain stated period, of an adverse claim, in case of conflicting application for patent.* This is the clear implication of Section 2325; but it is placed beyond doubt by Section 2326, which makes it the duty of an adverse claimant, to commence proceedings in a Court of competent jurisdiction within 30 days after filing his adverse claim, adding, "And a failure to do so shall be a waiver of his adverse claim."

The Court says in this decision, "There is no pretense that the claim (the prior lode-location under consideration) was forfeited." There was indeed no pretense that the claim had been forfeited by failure to mark it or work on it; but the placer-patent itself, issued to the plaintiff, was proof that the lode-locator had filed no adverse claim; for the filing of such a claim within the legal period, in obedience to Section 2325, would have suspended all proceedings in the Land Office. Did not this failure to assert his claim forfeit the sacred property right of the lode-locator?

The answer is, No; *because Section 2333 protects him, and for no other reason.* If the patent of Mantle had been a lode-patent instead of a placer-patent, the failure of the defendant's grantor to file an adverse claim during the period of advertisement would have been fatal to the prior lode-location. But because it is a placer-patent which conflicts with the lode-location, the property-right of the lode-locator is unimpaired.

It follows that Section 2333 must apply to located lodes, in order to maintain the consistency and force of the decision of this Court upon the case.

Again, if that Section does not mean lode-locations, then it does not protect the lines of such locations, but only the lode-right, with 25 feet of land on each side the middle of the vein. In Noyes vs. Mantle, the defendant below, having forfeited his location by failure to file an adverse claim, might perhaps be allowed to make a new one of entirely different shape and size. This has actually been the ruling of the executive department of the government, on the hypothesis that lodes, not locations, are meant by Section 2333.

Thus Secretary Teller, in review on appeal of the case of Barret et al (Copp's Landowner, Vol. 10, p. 18) declared that the possessor of a prior lode-location within a placer-claim, who did not file an adverse claim and bring suit under Section 2325 during the period of advertisement of the placer-location, thereby forfeited his located ground, and that under Section 2333, he could take only his lode, with 25 feet on each side thereof,

A similar ruling has been made in two of the cases at bar. The defendants, seeking a patent for the Goodell lode, for instance, were denied the right to obtain a patent for their located ground, and have received permission to apply for a patent for a strip 25 feet in width on either side of the Goodell lode (Copp's Landowner, 10,150). This new application, made on December, 1881, has led to the present con-

test before this Court, the plaintiff here and below having brought an action to protect its legal rights and prevent the issue of such a patent to the defendants. So, that, although the evidence and diagrams in the printed record of this case indicate the full located claims of the defendants, they have in reality already been forced to abandon all, but a strip of 25 feet "on each side" of a lode, the existence of which is known only, if at all, at one point, and the course of which has never been traced to this day.

Such decisions on the part of the land department make sad havoc of the property in the highest sense which has been supposed to be safely held by the lode-locator without any help from Section 2333. For they take away from him all those other lodes, which may have their apexes within his original location, and which by virtue of that location were granted to him just as sacredly as the one he first discovered. Yet, if Section 2333 refers to lodes only and not lode-locations, it is difficult to escape from the decision of Secretary Teller as a logical consequence.*

United States vs. Iron Silver Mining Co.

This was a suit in equity to annul a placer-patent on the ground of fraud, the fraud alleged being the existence of known lodes within the placer-claim not disclosed in the application for the patent.

*It should be born in mind that as Noyes vs. Mantle *was a suit in equity*, by the lode-locator against the placer patentee, no question as to whether or not the lode-claim was excepted from the placer patent was necessarily involved, as under the facts disclosed by the evidence and found by the court, it was entirely clear that if the *legal title* to the land in controversy passed by the placer patent, its grantee held the same in equity as trustee for the lode-locator; while in the cases at bar the question relates wholly to the *legal title*.

It should be pointed out in considering this case that the construction of Section 2333 herein contended for, (namely, that it refers to lodes already located, that is, to lode-locations), does not necessarily exclude the view that the possessor of a placer-claim containing a lode not located, but so "known" to him that he can if he chooses, lay out a legal location covering its apex within the placer-claim, is bound under the first clause of Section 2333 to make such a location and apply for a patent upon it. For, if he knows the position of the apex, so that he could make a location upon it, and if no other party has claimed it, he may perhaps be held to have an inchoate possession of the lode, which it is his duty to perfect by location. If he neglects this duty, no third party is wronged, because, by the hypothesis, no third party has at that time initiated any claim whatever. But the United States may have cause to annul such a patent. This, we submit, is indeed the only possible way in which the existence of a lode not located, but known to the applicant in a placer-claim including its apex, can be made the basis of proceedings against the placer patentee or his grantees. And this proceeding is not properly based upon the constructive disclaimer of the possession of a lode-claim, provided for by the latter part of Section 2333. For, by the hypothesis, no such claim existed at the time when such disclaimer was made, if it was ever made. There was no area marked out, which such a disclaimer would have excepted from the grant of the placer-patent.

If such a claim has been located, and constructively disclaimed by the placer-applicant, that disclaimer would have excepted from the grant of the placer-patent the area so marked out, and with it not merely the one known lode, the apex of which it contained, but also all other lodes or parts of lodes having their apexes within the same defined area. Some of these might be of greater value than the originally discovered and located lode; but the lode-locator would have (and the placer-patent would except from its grant) the possession of them all, throughout their entire depth. It is therefore essential to the constructive disclaimer that it should apply to an existing defined tract; for it may cover the possession of several lodes, and how much it does cover cannot possibly be known in the absence of the definite boundaries which control the lode-rights.

It follows that if the placer applicant can be held to have neglected his duty, under the first clause of Section 2333, in not proceeding to make a legal location upon a lode-apex known to him within his placer-claim, and to include the same in his application, and by such neglect of duty to have purchased mineral land at $2.50 per acre for which he should have paid $5.00, and to have evaded the purpose of Section 2333 the remedy is not to consider him as having disclaimed, and his patent (otherwise valid) as having excepted, an area, with its appurtenant lode-rights, not determined at the time of his neglect, but to be determined at any subsequent time by later discoveries and explorations. The constructive dis-

claimer is entirely inoperative in such a case ; and the remedy. if a remedy be necessary, is to annul the patent itself, on the ground of *mala fides* exhibited in the conduct of the placer-applicant.

Evidently, this course does not necessarily impugn the construction of Section 2333 herein advocated. For it still assumes the thing to be applied for under the first head of the section, and the thing to be constructively disclaimed under the later provision, to be a lode-claim, consisting of a defined tract, with certain extra-lateral lode-rights.

Such a proceeding, however, is clearly in the nature of a penalty inflicted upon the patentee for his neglect ; and it is not conceivable that he should be so punished for not doing what he could not have done. One thing he could not possibly have done because it is forbidden by the law, is the making upon any lode of a legal location which does not contain the apex of that lode. Nor can application be made for a lode-patent unless the surface described is shown to contain the apex.

The letter of Commissioner Williamson to the Surveyor-General of Colorado, August 31, 1877, (Copps U. S. Mineral Lands 2nd ed., p. 220) after reciting the provisions of the statutes, very clearly and soundly states the rule of the land office as follows :

"From the foregoing provisions of law, it will be seen that no patent can issue for a vein or lode without surface ground, and the surface which overlies the apex of a vein or lode discovered in a tunnel can only be ascertained by sinking a shaft or by follow-

ing a lode upon its dip from the point of discovery. A survey of a lode of this kind cannot properly be made until it has been definitely determined as above indicated, what portion of the public domain overlies the apex of such lode."

This letter refers primarily to the case of a lode discovered in a tunnel, and presumably at such a depth that the exact locality of the apex cannot be known from such a discovery. It applies, however, with equal force to the discovery of a lode by intersecting it with a deep vertical shaft. A lode so discovered *on its dip*, may or may not be legally "within" the particular tract which contains the shaft. Consequently, no such discovery, without the determination of the position of the apex, can be the basis of a valid lode-location, such as may in turn be the basis of a lode-patent.

This only brings us by another line of reasoning to the point already stated more than once, namely, that a lode dipping beneath the surface of a placer-claim, from an apex outside, is not such a lode "within" the claim, as is contemplated in Section 2333, on any construction of that Section; and hence, that until the locality of the apex of a lode has been determined, it can not be known whether the lode so exists "within" a given tract or not.

In this case, *U. S. vs. The Iron Silver Mining Company*, this Court said, concerning the proof of the known existence of lodes:

"It is not enough that there may have been some indications by outcroppings on the surface of lodes or veins of rock in place, bearing gold or silver or other

metal, to 'justify their designation as 'known' veins or lodes. To meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploration."

This passage, by its allusion to "outcroppings on the surface," clearly refers to lode apexes within the placer-claim, and therefore to such lodes only as the placer-applicant could have located legally, if he had been so disposed.

So far as the cases at bar are concerned, this opinion is conclusive, if it be adopted as the authoritative definition of a "known lode." For these cases do not contain a scrap of evidence going to show the existence of *such* a lode, either at the time of the placer-application or at any subsequent time, within the placer-claims concerned.

But *U. S.* vs. *The Iron Silver Mining Company*, being a proceeding to annul the patent, has, strictly considered, no bearing upon the cases at bar, in all of which the validity of the patent is conceded, and the attempt is made to establish the constructive disclaimer, and the consequent exception from the grant, of certain lodes and lode-rights. The two propositions are entirely distinct; and this Court is not necessarily bound, by the view it may have taken as to the conditions justifying the *cancellation of the whole patent* as void, to take the same view as to the conditions creating *an exception from the grant of the patent*, and, by implication, leaving that grant in full force as to all territory and rights not thus excepted. Indeed we may go further and say that if the pleadings in

the case of *U. S.* vs. *The Iron Silver Mining Company* present a ground for proceedings on the part of the United States to set aside the placer-patent of the Iron Silver Mining Company therein attacked, then it follows irresistibly that the existence of "known" lodes not located is *not the fact* contemplated in that part of Section 2333 which decrees the constructive disclaimer of possession.

For the constructive disclaimer conditionally decreed by Section 2333, is not a penalty; it is simply the definition of a result, which may or may not be according to the wish of the placer-applicant. For instance, *A* is about to make application for a patent upon his placer-location, within which there is a lode-apex not located, although already discovered, and so "known" that it could be located at once. But *B* who in fact discovered it, and who has hitherto neglected to make a location upon it, will undoubtedly contest the right of *A* to make such a location, and under the local regulations of the district, will undoubtedly defeat *A's* location. Moreover, *A* recognizes the justice of *B's* prior claim, and does not wish to wrong him. On the other hand, he is not willing to incur the delay and expense of making, recording and surveying the lode-location himself, only to have *B* take it away from him. Yet he cannot describe such a location and except it from his placer-claim, unless it has been defined by metes and bounds. In this situation he makes a personal agreement with *B*, to whom he gives a written statement admitting his own positive knowledge of the existence within the placer-claim of the lode-apex in question. Protected

by this document, *B* offers no protest against the proceedings for placer-patent; and in due time the patent issues to *A*. Upon the hypothesis here assumed, the "lode" would have been conclusively disclaimed by *A* and excepted from his patent, if he had given no writing to *B*. The writing serves merely to furnish *B* with incontestable proof of *A's* knowledge at the time.

Meanwhile, *B* proceeds to trace the course of the vein and to determine the boundaries of his location upon it, and in due time applies for a patent upon the lode-location thus made. *A* makes no objection to the issue of this patent, and his written acknowledgment produced before the land office is satisfactory proof that *B's* lode-location, though it seems, according to official maps and records to be not on the public land, but on land already granted to *A*, was in reality reserved from the grant to *A*, and may therefore be patented to another; and *B* gets his patent accordingly, while *A* is perfectly satisfied, having saved time and money by a constructive disclaimer, and having secured a perfect title to all the rest of his placer-location.

On the assumption that Section 2333 decrees a constructive disclaimer applicable to lodes not located, the foregoing imaginary but by no means improbable case would involve no blameworthy act or neglect on the part of *A* or *B*, and no infliction of penalty on either. In other words, under that assumed construction of Section 2333, the placer-claimant may ignore in his application for patent if he

chooses a lode unlocated, but known to him to have its apex within his placer; and the only result of his ignoring it is that he does not acquire it by virtue of the patent. There is no hint of any irregularity in the patent itself, and no ground for annulling it. It is true that in the imaginary case above stated, a third party, *B*, is concerned, as intending to make a lode-location. The case therefore applies strictly to an unlocated lode which a third party intends to locate. But *A's* written acknowledgment given to *B*, and *A's* silent disclaimer of possession convey no title to *B*. They simply leave the lode in the public domain, subject to location by *B* or anybody else. And *A's* course, if it be legitimate in view of his agreement with *B*, would be equally legitimate if nobody claimed or intended to locate the lode in question.

Now, a course which is distinctly permitted and provided for in one part of Section 2333 *cannot be held to be such a violation of that section as to warrant the annulling of the patent thus obtained; and hence, if the application for a placer-patent, without mention of unlocated lodes known to exist within it, be a sufficient ground for annulling the patent, then that omission cannot be the omission provided for and permitted, and simply regarded as a disclaimer resulting in an exception out of the grant of the patent.* The same act cannot be both permitted and punished.

Now, in the *U. S.* vs. *The Iron Silver Mining Company*, as already stated, it was sought to annul a placer-patent on the ground that "known lodes"

within the placer-location had not been mentioned in the application for the patent. The court below having dismissed the bill, and appeal having been taken, this court affirmed the decision below and sustained the patent, on the ground that the evidence did not establish the existence of such known lodes, and added the very plain and reasonable observation that, "to meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

The Court did not say, "Even if the existence of these known lodes were sufficiently proved, the United States cannot annul the patent on that account. That case is otherwise provided for. The patent is perfectly regular and valid as to what it does convey. It simply does not convey these known lodes; that is all."

This the Court did not say; and what it did say of the allegation in the bill was "if established, the Government could justly demand a cancellation of the patents.

It is respectfully submitted that this decision thus excludes by clear implication the view that unlocated lodes are merely disclaimed when they are not mentioned under the conditions stated in Section 2333, and hence that it is inconsistent with the construction of that Section as applying to lodes not located and claimed.

On the other hand, it is entirely consistent with the construction of the said Section herein main-

tained. For under that construction, the following propositions may be maintained, as has been already shown at length in preceding parts of this argument :

a. A lode-location, known to exist (whether recorded or not) within the boundaries of a placer-location, at the time of the application for the placer-patent, and in the possession, disputed or undisputed, of a third party, is, if not mentioned in the said application, conclusively disclaimed and excepted by such silence. The possessor of such a lode-location is not called upon to file an adverse claim and begin a suit, unless the lode-location is mentioned and claimed in the application for patent. He is exactly in the same position as if the placer-applicant had made an explicit disclaimer and exception of the lode-location, instead of a silent and constructive one.

b. If the placer-claimant, at the time of his application, is himself in possession of a lode-location within the placer-location, it is his duty to state the fact in his placer application, and receive a patent for both the placer-claim and the lode-location with its lode-rights, paying $5 per acre, instead of $2.50, for the surface included in the lode-claim, and for a strip of land 25 feet wide on each side. In other words, he may make his lode-claim as narrow as he chooses, within the maximum width, set by Section 2320, of 600 feet ; but he must pay for at least a width of 50 feet.

c. If the placer-claimant in actual possession of an included lode-location, as described, does not obey the directions of Section 2333, but, without men-

tioning his lode-location, obtains a patent for the placer-claim including it, at the rate of $2.50 per acre for the whole, then he has disclaimed possession of the lode-claim, but such a disclaimer affects no third party, and amounts in itself to no more than an abandonment of the lode-location, which thereupon ceases to exist, and the tract which it occupied before such abandonment reverts to the public domain, becomes subject to sale by the government, and is actually sold and conveyed by the patent to the applicant. Under the "constructive disclaimer" clause of Section 2333, he has lost nothing but the special lode-rights attached to a lode-location. But the law "has yet another hold" on him; for he has deliberately disobeyed the imperative command of the first sentence of Section 2333. That command makes an exception in his case to an otherwise universal permission. Any other lode-locator may abandon his location whenever he likes, and have no further responsibility concerning it. But the lode-locator within a placer-claim also in his possession, is forbidden to abandon his lode-location in applying for a placer-patent. And if he disobeys in this respect, his patent may be annulled, as it might be in any other case of fraud. The result would be, not that he had lost his lode-rights merely, by a constructive disclaimer of them, but that he had lost the whole grant, in securing which he had both violated the law and defrauded the government. This result, however, could not be brought about through an attack upon the patent itself in a collateral proceeding. The government alone has been wronged, and the govern-

ment alone can seek the remedy. And until that has been done, the patent is conclusive proof of the ownership of the whole tract granted by it, within which at the time of the application no third party had any rights.

d. If it be proved that at the time of the application for placer-patent, the placer-location included a "known lode," that is, a lode upon the apex of which a legal lode-location could be made, but never had been made, or having been made, had been abandoned, so that the lode was open to re-location; that this lode was "clearly ascertained, and of such extent as to render the land more valuable on that account, and to justify its exploitation;" and that the placer-applicant failed to mention it in his application, and apply for a lode-location upon it, the case falls under the same principle as has been just stated under *c.* For it was there shown that the placer-claimant is forbidden by Section 2333 to abandon his included lode-location, returning it to the public domain, and then buy at half price, as part of his placer-claim, the land it occupied. His abandonment, formal or implied, extinguishes the lode-claim, but it leaves the locatable lode, on which he has been commanded to retain his location and apply for a patent in conjunction with his placer-patent.

Now, the abandonment of a previous lode-location by any other party (provided the apex of a valuable mineral lode were known to exist in it), would leave likewise a locatable lode; and the known existence of a clearly ascertained apex of a valuable mineral

lode which had never been claimed by anybody likewise presents a locatable lode. In both these cases, though the lode can scarcely be said to be fully in possession of placer-claimant, (since nothing but location gives the possession of full lode-rights), it is not unreasonable to hold that the locatable apex upon which a former location has legally ceased to exist, or upon which no location has ever existed, is to be regarded as it would be if the placer-claimant himself had formerly made a location upon it, and then abandoned or disclaimed that location. It is merely a basis, known to him, for a legal lode-location—a locatable lode not in the possession of anyone else, of which he can at once take possession if he chooses, and then proceed as Section 2333 requires.

Now this is precisely the case presented by the allegations of the original bill in *U. S. vs. The Iron Silver Mining Company*, and the decision in that case implies that the omission to mention, under the circumstances stated in Section 2330, known lodes not located, works *not* disclaimer of the lodes themselves, but forfeiture of the patent.

The application of this principle to the cases at bar would render all further argument unnecesary.

We think it has thus been shown that the decisions of this Court hitherto would not be disturbed in their essential features or in their practical effects by the adoption at this time of the rational, practicable and consistent construction of Section 2333 herein set forth and advocated. This Court has been obliged

to consider cases as they came before it, each presenting a narrow view, and a small part only of the great field which might be affected, directly or indirectly, by the decision of the special issue presented. It is matter for surprise and gratitude, that in dealing at such disadvantage with questions so complicated and far-reaching, the Court has said so little, even by way of incidental remark, which could be perverted to the injury of mining titles. But it is respectfully and earnestly submitted that a deliberate and careful review of the whole question herein discussed should now be made by the Court, independently, even of its own previous partial and limited definitions and intimations.

In conclusion, a word may be permitted as to the manifest endeavor in the cases at bar, to throw upon the Iron Silver Mining Company and its grantor, William H. Stevens, the odium of having attempted by a trick to evade the law and to obtain under the guise of a placer-claim, known valuable mineral deposits to which title could not have been honestly obtained. But the evidence in all these cases, and in other cases before this Court, in which the Iron Silver Mining Company has been a party, reveals but one important mineral deposit underlying the surface in dispute, namely, the so-called blanket-lode or contact-lode of which the Iron Silver Mining Company holds at various points the apex, by lode-locations upon it. It

was a perfectly legitimate and proper step for this Company to purchase also a placer-claim, covering a part of this deposit in its downward course, with the view of protecting itself in its extra lateral lode-rights against the operations of parties who might by sinking shafts ouside of its lode-locations, strike its lode in depth, and force it to a very large expenditure in underground connections before it would successfully establish its title. In the absence of known lodes with their apexes within the placer-claim, no lode-locations could have been legally made there; and the placer-claim, actually worked at one time for placer-gold, would give, if duly perfected by patent, a right to the ground desired. Moreover, if, as has happened several times in litigation to which this company has been subjected, the claim should be set up that the so-called blanket-lode is not such a lode as is contemplated by Section 2322, and therefore cannot be held by extra-lateral lode-rights, the placer-claim would hold that part which it covered, by virtue of Section 2329, which includes under placers all mineral deposits except lodes. Under one section or the other, plaintiff would be protected in its large investment of capital. This policy of acquiring by purchase the neighboring surface is the only recourse left to the investors of capital in mining under the U. S. laws, to guard against unforeseen conflicts of title, arising from the difficulty of applying the statutes to the actual conditions of the business. It is submitted that the attempt by strict obedience to

the law to secure such protection as it can afford, is not a course deserving of suspicion or rebuke.

We submit that the judgments in Numbers 6 and 7 should be reversed, and the judgment in Number 16 affirmed.

L. S. DIXON,
JAMES McKEEN,
ASHLEY POND,
FRANK W. OWERS,
Of Counsel for Iron Silver Mining Company.

R. W. RAYMOND,
Consulting Engineer.

(*Note to first paragraph, page 11*) While this definition of a lode does not require a specified geological origin, it does require a specified form, and ascertainable boundaries by which that form may be determined. The lode must be a "zone or belt"—words which, as applied to rock-masses, are universally understood as meaning that two dimensions, the horizontal length (called by miners the "course" or "strike") and the depth, measured on the inclination or "dip" (called in Section 2322 the "course downward") shall be predominent, while the third dimension, namely the width, shall be subordinate and limited by boundaries separating the zone from the neighboring rock. The reason for requiring these requirments for legal "lodes" is clear. The lode-locater acquires certain special rights, which depend for their definition and therefore for their existence, upon the "strike" and "dip" of his mineral deposit. If it be of such a nature as to have no strike and dip, these lode rights cannot accrue.

Any mineral deposit which cannot be regarded (after due allowance for the local irregularities of nature) as a "zone or belt" with a "course" and "dip," cannot properly be located as a lode under sections 2320 and 2322. *Such deposits do exist and are expressly provided for in Section 2329*, which includes, with "claims usually called placers." "*all* forms of deposit, excepting *veins* of quartz or other rock in place."

Office Supreme Court U. S.
FILED.
NOV 11 1891
JAMES H. McKENNEY,

Supreme Court of the United States.

THE IRON SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE MIKE AND STARR GOLD AND SILVER MINING COMPANY.

SAME, PLAINTIFF IN ERROR,

vs.

SAME, DEFENDANT IN ERROR.

JOHN L. SULLIVAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE IRON SILVER MINING COMPANY.

Sections of Revised Statutes Referred to in Brief for Iron Silver Mining Company.

SECTION 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed,

are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode, but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall

have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations; but their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States Surveyor-General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of

the notice in such land office, and shall thereupon be entitled to a patent for the land in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made for the period of sixty days in a newspaper to be by him designated as published nearest to such claim, and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States Surveyor-General that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy

shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered the party entitled to the possession of the claim or any portion thereof may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like

circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Supreme Court U. S.
FILED.
NOV 19 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE IRON SILVER MINING COMPANY, *Plaintiff in Error*,
vs.
THE MIKE & STARR GOLD AND SILVER MINING COMPANY.
No. ~~231.~~ 2

THE IRON SILVER MINING COMPANY, *Plaintiff in Error*,
vs.
THE MIKE & STARR GOLD AND SILVER MINING COMPANY.
No. ~~232.~~ 3

Error to the Circuit Court for the District of Colorado.

Reply on Behalf of the Iron Silver Mining Company to Mr. Patterson's Brief.

I.

[The divisions of this reply are numbered to correspond with those of the brief here reviewed.]

On page 5 of Mr. Patterson's brief the change of order in the words of Section 2320, by which it is here said "the sense is in nowise changed," does in reality alter the sense of the section radically. As it stands in the law, it refers to mining claims upon veins or lodes, *which lodes* bear gold, silver, * * * "or other valuable deposits." As changed in the brief of Mr. Patterson, it would refer to veins, lodes, *or deposits* of rock in

place bearing gold, etc. In other words, if there is such a thing as a valuable mineral deposit of rock in place *not in the form of a vein or lode*, it is *not* included in Section 2320 as the words now stand, and it *would be* so included by the change here proposed.

That there are such mineral deposits in place, not lodes, is a notorious fact. That they are provided for by the statutes is clear from Section 2329, which distinctly mentions "all forms of deposit, excepting veins of quartz or other rock in place."

Section 2320 itself clearly restricts its own meaning. It regulates the length of lode claims "along the vein or lode," and their width "on each side of the vein at the surface," and it provides that no location of such a claim shall be made until the discovery of the vein or lode within the limits of the claim located. It is beyond question that a deposit of any kind *not a vein or lode* does not come within the scope of this section and does come under section 2329.

It is not true, as counsel argues, that the language of Mr. Justice Field in the Eureka case widens the sense of the term lode so as to include all valuable deposits of rock in place, of whatever form. The admirable definition given by Mr. Justice Field in that case eliminates the question of special manner of formation, but carefully retains the condition of form. A lode must be a clearly bounded mineralized *zone* or *belt* of rock. It may be an upturned sedimentary bed, or a contact layer between two sedimentary beds, or a fissure vein traversing such beds. It may consist of rock which was mineralized in the process of its first formation, or it may have been subsequently mineralized in one or more of many ways. All that goes for nothing in the eye of the statute, provided the mineralized body of rock in place is a zone or belt. If it cannot be recognized and defined as a zone, having a course and a dip and more or less parallel walls of country rock, it is not a lode within the meaning of Sections

2320 and 2322, because it is impossible to locate upon it such a claim as is prescribed in Section 2320, or to define in connection with it the extra-lateral lode-right granted by section 2322.

On pages 7 and 8 counsel contends that there are "but two classifications of the form in which the ores are found," and that "the distinguishing feature of the two classifications is 'quartz or other rock in place.'"

This is incorrect. The law recognizes three classes as to form, namely:

I. Veins or lodes of quartz or other rock in place.

II. Claims usually called "placers."

III. All forms of deposit *not* usually called placers, excepting veins of quartz or other rock in place.

Classes II and III are included, for the purpose of administration, in one category, for the simple reason that, however widely different in other respects, they are alike in this, that the peculiar provisions laid down for Class I cannot be applied to them. If they have no apex in the public land, no walls, no course, no general dip—whether they are in place or not—it is impossible to locate lode claims upon them as the law requires; claims with parallel end lines covered by the lode in its course; with a certain maximum length along the lode and a certain maximum width on either side of the lode at the surface; and with certain definite extra-lateral rights on the dip of the lode under neighboring tracts. The distinguishing feature between Sections 2322 and 2329 is not, as counsel says, the term "rock in place;" it is the word "veins."

An isolated spherical body of quartz carrying silver could not be located as a lode, but it could be acquired under Section 2329 by the same proceedings as are prescribed for a placer claim.

A mass of limestone filling the whole area of a claim, and of many adjacent tracts, often cannot be located as a lode;

but such locations (called by miners "lime placers") are frequently and properly made under Section 2329.

In the Eureka case, upon which counsel relies, a comparatively narrow belt of mineralized limestone was held to be a lode. The evidence in that case proved that this belt, though pinched at one point to a few inches in width and widening at another point to over 300 feet, was bounded throughout by a foot-wall of quartzite and a hanging-wall of clay shale. It had a strike and a dip, and was as regular a vein as could be demanded, except that it was not technically a fissure vein, but an upheaved and mineralized stratum of originally sedimentary rock. The court said that this circumstance made no difference, provided the deposit was a geological unit, presenting those features of form which are absolutely necessary for the application of Sections 2320 and 2322 to the case—the features, namely, of a zone.

On page 9 counsel argues that the statute does not apply to profitable lodes only. While this is literally correct, it would be a fairer statement of the spirit and purpose of the law and of the universal practice of the courts, the miners, and the Land Office under it, to say that while the statute contemplates the location of a valuable lode, the acts of the miner in locating, working, and, perhaps, subsequently buying his claim, are accepted as presumptive evidence of value, actual or prospective. On the other hand, the absence of such evidence raises the opposite presumption. When it is asserted that a lode was discovered at a certain time and place by a professional miner, but it appears that the alleged discoverer made no location then or for many months thereafter, and that during this period, when any other prospector might have located the alleged lode, no one did so, the acts of the alleged discoverer furnish a presumption against the alleged discovery.

"Miners locate and patent lodes," says counsel (p. 9), * * * "because they have discovered something that a miner may follow in expectation of getting pay-ore." Pre-

cisely true; and when miners do not locate, it is because they have not discovered anything of the kind.

II.

The claim of counsel (p. 13), that "the fair interpretation of the language (of Section 2333) is that, if a vein or lode is known by *any one* to exist within a placer claim, a placer patent will not convey the title," does not bear examination. Will not convey the title to *what?* The answer must be, in the language of Section 2333, to "the vein or lode claim." But such a claim is a tract of land, and if it is not conveyed by the placer patent, but may be staked out and taken in possession at any subsequent time by a lode locator, then the lode locator acquires that area completely, including not only the supposed lode, with all other lodes apexing within the tract, but the right to the surface and all below it, including the placer mine itself! And since, by counsel's contention, it is not necessary that a lode should be valuable in order to be locatable, or that it should have been located in order to show that it was deemed to have some prospective value, it becomes, according to this view, only necessary that somebody should have "known" prior to a given date of the existence of a seam or crevice or piece of ore in place anywhere within a patented placer claim, in order that the title of the placer patentee should be destroyed as to an unknown area, even of his surface and his placer. This previous knowledge of "anybody" is not proved by such evidence as a location; hence it may be proved by oral testimony, recollection, hearsay, circumstances, and inferences. Let seams enough be "recollected," and the whole of the placer may be taken away from its *bona fide* purchaser. That this should be possible on the ground of the ancient knowledge of "anybody," involves a novel interpretation of the force of a grant of land by the patent of the United States.

Counsel's illustration (page 14 and following pages), drawn from the conditions of mining at Leadville, ignores the fact that if the great "lode or deposit" of lead and silver to which he refers is legally a lode it has an apex. If it has an apex, the locators of claims upon that apex according to law will own the lode through its entire depth. If it has no apex it cannot be subject to lode location at all. In the former case, unless the apex is within the placer claim, the lode is not in the placer claim in the sense of Section 2333, but is a lode situated outside of that claim and entering it in its course downward.

Now, in these cases, the so-called blanket lode is everywhere admitted by both sides to have its apex outside of the placer locations. It is consequently absolutely irrelevant to the cases at bar. If this lode had been, at the time of the placer application, not only believed, but actually proved by mining work, extending downward from the apex into the placer locations, to continue into those locations, it would still be irrelevant. When the owner of a lode claim has followed his lode downward into adjoining ground, that fact does not prevent the adjoining ground from being acquired, subject to his rights, by other parties.

Now, if absolute proof of the existence of this blanket lode under these placers could not affect the pending issue, how can partial and indirect proof, merely tending to show the fact and the knowledge of it by Moyer, or Stevens, or "anybody," or everbody, be considered relevant?

The argument of counsel, page 18 and elsewhere, that a placer locator, having secret knowledge, perhaps, of the existence of a lode within his location, could (unless counsel's views be accepted) prevent its discovery and location by another, and thus defraud the Government and the mining community by getting the lode, with a larger tract, at a smaller price than if the lode were located, is based on an error of fact. The U. S. statutes grant no exclusive possession of the surface to placer locators. That right is confined by Section

2322 to lode locators. Until the placer locator has made application for patent, there is nothing in the law to prevent the discovery and location of lodes within his claim by anybody. As a matter of fact, every one of the lode locations along the apex of this blanket lode on Iron Hill, as shown upon our model, was made within an existing and valid placer location.

The placer locator, therefore, is not, as counsel says, "protected from intrusion by third parties." Consequently the whole of the argument based on this error falls to the ground.

IV.

It is perhaps unnecessary to point out that the construction given on page 19 of the brief to Section 2333 involves a cruelty and injustice towards the purchaser in good faith of mineral land which Congress is not likely to have intended. Counsel describes the result as the misfortune of the placer claimant and the fault of Congress. To which the obvious answer is, that if there be a construction of this Section relieving the placer claimant from misfortune and Congress from the imputation of fault, it should prevail.

In whose favor or for whose sake, under the case here stated, is this misfortune inflicted? A offers to buy from the Government a piece of mineral land. He knows of no lodes in it. Nobody has located any. But somebody knows of a lode or a lot of lodes there, which he has never thought worth the trouble of locating. Yet the reservation from A's title for which counsel contends is not made in favor of that "somebody." He may never care to follow up his former knowledge, but on his testimony *anybody*, at any time, may enter upon A's land, stake out as many tracts as somebody or several somebodies can recall lodes, and oust A. The whole business would be ridiculous if it were not outrageous. There are undoubtedly defects in the mining

statutes, but their severest critic never believed that Congress had deliberately constructed in Section 2333 a device for destroying the title to real estate and bestowing premiums upon piracy.

But, under the same head (pages 19 and 20), counsel shows how the placer claimant may, if he knows of the existence of the lode, readily discover its general direction through the claim, mark off "a strip of ground fifty feet wide, including the lode—the length of the lode within the placer claim—and describe this tract in the placer patent as the lode claim purchased with the placer."

That is to say, by the ingenious device of laying out a placer claim to include a known lode, and then claiming "the length of the lode within the placer claim," a lode locator might secure 3,000 or 6,000 feet along the lode instead of 1,500. This *reductio ad absurdum* is one of many which refute the construction of Section 2333 as applying to anything but lodes already located.

V.

Under this head (discussing Question IV of the court) we need do no more than refer to the argument already made on pages 47 to 51 of our principal brief, and the citation of the case of I. S. Mining Co. *vs.* Reynolds, 116 U. S., 687, and 124 U. S., 374, there made.

VI.

On page 25 and following pages counsel says that the proofs went to the existence of at least two or more lodes—one the great underlying lode, etc., and the other the lodes or veins that are cut and disclosed in the Mike tunnel.

We repeat that "underlying lodes," great or small, have nothing to do with the issues here. The only alleged veins pertinent to these cases are those asserted to have been found

in the Mike tunnel. Now, not a particle of the evidence concerning lodes in the vicinity of the placer locations bears directly or indirectly on these Mike tunnel veins. On the contrary, this outside evidence is adduced to show the probability of a fact which would be irrelevant if absolutely proved—namely, the existence of the "underlying lode."

Hence all this evidence was improperly admitted.

VII.

On page 33 counsel argues that the Mike tunnel must have been run before any placer claim had been located, because if the location had existed at that time Hayes and his partners would not have been permitted to go within its lines to run a tunnel. The deduction is erroneous in fact, and the premises are equally so. The placer locator not having at that time applied for a patent could not prevent anybody from entering upon his claim.

As to the evidence cited by counsel on page 36 and following pages concerning the Mike tunnel discoveries, little need be said here in addition to what has been said already in our principal brief. But we may point out:

1. That the so-called Goodell and Gardiner lodes were not identified by any witness. The witness Hayes says (p. 56 of printed record) that no veins are shown in the two discovery shafts on which the locations were made; and, when we turn to the testimeny as to the abandoned tunnel, we find the same witness (p. 52) swearing to four veins there, and other witnesses to two or three or several, and not one of them stating which lode is the Goodell and which the Gardiner.

2. In other words, even at this late day, the defendants are not prepared to lay out the tract within our patented ground, which they claim we do not own. They cannot tell

where the lodes run which they say belong to them. All they have to say on that head is (p. 57) that they have sunk two shafts to find their lodes where they thought they ran, but that these shafts did not cut them. The defendants are asking this court, by its decision, to leave them still free to find out where their known lodes are, and whether they run anywhere; and to determine, upon the results of such future discoveries, what land, if any, ~~which~~ is excepted from our patents.

L. S. DIXON,
ASHLEY POND,
Counsel for Iron Silver Company.

IN THE

Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1888.

THE IRON SILVER MINING CO.
Plaintiff in Error.

vs.

THE MIKE AND STARR GOLD AND SILVER MINING CO.
Defendant in Error.

No. 231.

Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

T. M. PATTERSON,
C. S. THOMAS,
CLINTON REED,
Atty's for Def't in Error.

NEWS PRINTING COMPANY,
DENVER, COLO.

IN THE

Supreme Court

IN THE

Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1888.

THE IRON SILVER MINING CO.
Plaintiff in Error.

vs.

THE MIKE AND STARR GOLD AND SILVER MINING CO.
Defendant in Error.

No. 231.

Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

The plaintiff in error commenced its action in ejectment against defendant in error in the State Court. In its complaint the plaintiff alleges ownership in the William Moyer

placer claim, containing 56.69-100 acres of land, which is described by metes and bounds, entry and ouster by defendant, and unlawful detention.

Defendant in its answer, denies the allegations of the complaint, and alleges specifically, that the placer claim was conveyed by patent from the Government, dated January 30th, 1880, to William Moyer, and that plaintiff obtained title from Moyer's grantees.

The answer further alleges that the government patent conveying the land contained the following reservation: "That the grant hereby made is restricted in its exterior "limits to the boundaries of said lot No. 300, as herein- "before described and to any veins or lodes of quartz or "other rock in place nbearing gold, silver, cinabar, lead, tin, "copper or other valuable deposits, which may have been "discovered within said limits subsequent to said date and "not claimed or known to exist at the date hereof."

"*Second*—That should any vein or lode of quartz or "other rock in place, bearing gold, silver, ciniabar, lead, tin, "copper or other valuable deposits, be *claimed* or *known* to "exist within the above described premises at the date "hereof, the same is expressly excepted and excluded from "these presents."

It further alleges that at the time of the location of the Moyer placer claim and at the time of the entry of the land by the placer claimant in the U. S. Land Office, and the issuance of the patent, a lode vein and deposit of rock in place carrying lead and silver was known to exist, and was claimed to and did exist within the patented premises, which facts were known at all of the said times to the patentee, Wm. Moyer.

It further alleges that said vein or lode was known and claimed as the Gardiner lode, and that on the 1st day of February 1879, it was located as the Gardiner lode mining claim by the grantors through mesne conveyances of the defendant; the laws of the United States, of the State of

Colorado, and the local rules and customs of miners having been fully complied with in so doing.

The defendant justified the alleged trespass under the above facts; and because the issues presented a Federal question—that is, the construction of the Federal statutes relating to rights in known or claimed lodes or veins within the limits of land conveyed by the United States through a placer patent—the cause was removed to the United States Circuit Court, for trial and further proceedings.

The cause was tried before a jury, which gave their verdict for the defendant. Upon the trial the following facts were indisputably established:

1. As to the Wm. Moyer placer claim.

The application for patent was filed in the U. S. Land Office, November 13th, 1878.

The land was entered and paid for February 21st, 1879.

The patent was issued to Wm. Moyer, and executed by the President, January 30th, 1880.

2. As to the Gardiner lode claim.

It is located within the limits of the Wm. Moyer placer.

A tunnel, nearly 400 feet in length, had been run into ground covered by the placer claim and Gardiner lode claim in 1877, and several veins or lodes disclosed therein.

The Gardiner location certificate was executed March 10th, 1879, and recorded upon March 11th, 1879.

Prior to the execution of the location certificate the Gardiner claim had been surveyed and staked, and the discovery shaft sunk to the required depth, and the other acts were done to properly identify the claim.

The questions submitted to the jury were:

1. Was there a lode or vein of rock in place carrying precious metals within the Wm. Moyer placer?

2. If there was, was it claimed or known to exist at the date of the issuance of the patent, and before?

3. Was the existance of such a vein or lode known to the patentee, Wm. Moyer, at the date of the issuance of the patent, and before? And

4. Was the Gardiner claim located on any such lode or vein?

The course of the trial was:

The plaintiff company introduced to the jury the certificate of the land office, showing date of application for the placer patent, the certificate of entry and payment for the land, the patent from the government for the land, and proof that the Gardiner lode claim was within the land described in the patent.

The defendant proved the existence of a lode or vein within the Gardiner claim and the portion of the placer claim covered by the Gardiner claim; that William Moyer applied for a patent and obtained its issuance in behalf of and for the benefit of Wm. H. Stevens; that both Moyer and Stevens knew of the existence of this lode or vein long before the application for the placer patent was made; that the patent was applied for in the name of Moyer, and the land located as placer ground, in order that this vein or lode might in that way be obtained; and that plaintiff was seeking to hold it by a palpable fraud, practiced upon the Government by its grantors, they also proved the location of the Gardiner claim, and the title to it in the defendants by a proper chain of conveyances.

It is important here to notice that the plaintiff offered no proof in rebuttal of the defendants case. The plaintiff, neither in presenting its case in chief, nor after the defendant closed its proof, attacked in any way the proofs offered by defendants to establish the existence of the vein, and the knowledge of that fact by Moyer and Stevens, not only at the time of the issuance of the patent, but long before the patent was applied for. The only proofs offered by plaintiff at any stage of the case were their title papers and to identify the disputed territory.

It did not so much as pretend, either in the proof, the instructions asked, or in the argument, to any ignorance of the disclosures made by what is known as the Mike tunnel, but on the contrary, assumed the position that possesssion of the patent operated as an extinguishment of all rights which might accrue to outsiders by reason of information possessed by the patentee previous to his application. If the plaintiffs in error had denied that its grantors, on the first day of February, 1879, or at the time of application for patent, or at any other time, were ignorant of the existence of a lode or lodes within the boundaries of the Moyer placer, or if it had introduced testimony tending to show that the Mike tunnel disclosed nothing properly called a vein, and that the opinions of the witnesses of the defendants in error as to their presence were erroneous, they might claim, with some show of justice, that the instructions given by the Court, and which authorized the jury to find from the evidence that William Moyer did know of the existence of such vein or veins on the first day of February, 1879, operated to its injury. The position which it assumed, however, indicated that it shielded itself behind the possession of the patent and relied upon that alone, thus saying, in effect, "All you have proven may be conceded, and yet our right to the ground in controversy remains unquestioned."

It is in evidence that the tunnel, which begins on the Gardiner ground and runs easterly through the same and into the Goodell ground, was driven early in 1877, for the purpose of better enabling the owners of the Mike lode to develop it and realize a profit from ores which might be contained therein. The plat found at page 66 of the printed transcript locates it as pointing directly to the developments made on the Mike claim, but commencing lower down the hill, thus naturally striking the Mike ground at a considerable distance below the surface. It may be conceded that the original purpose of doing this work was to develop a lode already discovered, rather than to explore virgin

territory for other mineral deposits, but it does not alter the situation. There is no dispute but that this tunnel was driven between the 13th day of January, 1877, and the 24th day of April of the same year, being more than one year and a half prior to the application by Moyer for patent to his placer claim. Mr. Hayes, one of the owners of the Mike, and who drove the tunnel, says that he discovered the vein nearest its mouth and about 78 feet therefrom, on the 15th or 16th of February, 1877; also another, about 200 feet from its mouth, and which last must therefore have been upon the Goodell ground. At that time the Moyer placer claim had no existence. It was located by Moyer subsequently, and the plat before referred to shows that the Mike tunnel was driven almost in the center of the claim, which contains less than 57 acres, and therefore is but little over twice the size of the Goodell and Gardiner lodes.

It is true that no location was made of the Goodell and Gardiner claims until the first day of February, 1879, being a few days prior to the entry of the placer. It is also true that the location certificates of these claims were filed with the clerk and recorder on the 10th day of March, 1879, a few days subsequent to the entry of the placer. But we do not apprehend that these facts change the effect which knowledge, by the patentee, of the existence of these veins would have upon the granting clauses of his patent. This Court, in the case of Noyes vs. Mantle, 127 U. S. 348, has decided that where an application is made for patent to a placer claim, within the boundaries of which a lode claim has been located and staked, knowledge of the existence of the lode so claimed and staked will be conclusively presumed as against the applicant for the placer patent. That case has also decided the before then seriously controverted question as to whether section 2333 was intended to apply to lodes or veins within the boundaries of the placer claim, but not located by third persons previous to application. Since it is now the settled doctrine that the section referred

to was intended to exclude from placer patents all lodes or veins known to exist within their boundaries at the date of the application, unless expressly included therein, and whether located or not, it becomes necessary to ascertain whether the evidence in this case warranted the jury in finding the existence of this knowledge, and whether the instructions of the Court upon that subject can be said to have damaged or at all affected the rights of the plaintiff in error. The question of the existence of knowledge by the patentee of a placer claim, in cases in which the exceptions of the patent are challenged, have frequently been before this court. What facts constitute it, what other facts justify inferences of it, who is to be affected by such knowledge, whether general or particular knowledge or information is essential, these and kindred propositions have received exhaustive discussion before this tribunal. The question is one which partakes so largely of metaphysics, and gives such broad scope for abstract reasoning, that it is to be regretted that Congress, in framing the statute, had not used more specific terms, and thus relieved citizens from the commission of innocent mistakes, and courts and counsel from the neccessity of considering the question first from one and then from another standpoint.

The case of Reynolds vs. the Iron Silver Mining Compay, 116 U. S., 687, and Iron Silver Mining Company vs. Reynolds, 124 U. S. 374, involved the discussion by counsel of this question to a most exhaustive degree, and so difficult did the court find it to be to determine the general proposition so as to be applicable, practically to all cases, that it expressly declined to do so. In its first decision, while indicating that general knowledge might be sufficient, it announced that all questions as to the kind of facts necessary to constitute knowledge as required by the statute should be settled as they arose. When the case was last decided, it was declared that there was difficulty in determining whether knowledge in the case is had, but that between mere

belief and knowledge there was a wide difference. It also said, that knowledge of the existence of a lode or vein within the boundaries of a placer claim could be obtained from its outcrop therein; *or from the developments of the placer claim previous to the application for patent;* by the tracing of a vein from another lode, *or perhaps from the general condition and developments of mining ground adjoining the placer claim*, or from the information of others who have made the necessary explorations to ascertain the fact, and in other ways.

Applying these suggestions to case at the bar, and the conviction that Moyer and the real patentee, William H. Stevens, knew of the existence of these veins prior to the location of the ground, becomes overwhelming.

Freeland, a witness for plaintiff in error, admits that the Moyer placer is practically bounded by lode claims, which have been located and recognized as parts of the topography of the country. It is a fact that so early as 1874 the Mike lode, which forms the eastern boundary of the placer, was discovered and worked. Immediately north of that is the Starr, now belonging to defendant in error, and which accounts for the name of that company. Hayes, his brother, Starr, Norris, Moyer and Stevens were all old residents of the section, with Oro City, in the immediate neighborhood, as their common headquarters. Early in 1877 the first vein in the Mike tunnel was cut. No one was excluded from its examination, and one man was taken by Hayes to see it. When the placer was located and surveyed this tunnel and the dump at its mouth were conspicuous objects within its boundaries. It is extremely seldom that tunneling becomes an adjunct of placer mining. It is a very common feature of lode mining. When Moyer and Stevens employed Mr. Bates to survey the claim they made him their agent and representative for that purpose. By the rules of the land office, the surveyor is required to state the character of development upon the

claim, and give his estimate of the value of improvements thereon. It is practically impossible for Bates to have surveyed the claim, having men with him to carry the chain, and to have passed within three or four hundred feet of the mouth of this tunnel, gone to the very line of the Mike lode on the east, and then, on the west, to have again reached a point but little over three hundred feet from the mouth of this tunnel without having seen and examined it. Mr. Moyer desired to secure a patent for a placer claim, and knew that it was never the purpose of the government to give a citizen the right to acquire lodes or veins under or by means of such locations. Knowledge of the existence of these veins, from the developments of this tunnel, was therefore not only within his grasp, but he was naturally and necessarily required to investigate and examine the same, in order that his application for a patent should be made in the manner required by Section 2333. It has frequently been held by this and other courts, that wherever an individual has a right to demand relief from the consequences of fraud, he must bring his action for such relief within a reasonable time after the discovery of its existence, and the means of acquiring knowledge of the existence of such fraud has been held to be equivalent to such knowledge; hence, a complainant cannot excuse his delay in bringing his action by alleging ignorance, unless he also shows that he could not have acquired earlier knowledge of the facts on which his application is founded.

Angell on Limitations, 190, 470.
Odell vs. Rogers, 23 N. W. Rep. 229.
Wood vs. Carpenter, 101 U. S. 135.
Taylor vs. Railroad Company, 13 Fed. Rep. 152.

The principle supported by these authorities is analogous to the one for which we now contend. If in the language of this court, knowledge of the existence of a lode or vein may be obtained from the developments upon a placer

claim previous to the application for a patent, then an applicant is bound to avail himself of the means afforded for informing himself of the character of his ground; he cannot ignore the opportunities given him for the acquisition of knowledge; he cannot say, "It is true these developments were upon the ground, and made even before I located my claim, but I took good care not to look at them." If he could, a door for fraud and covin would be open, all of the consequences of which cannot well be foreseen. The appearance of a vein plainly outcropping from a ledge of rocks on the surface, the development of a lode in adjoining territory to the boundaries of the placer, with the consequent certainty of its extension therein; the general character and formation of the country and its want of adaptability for placer purposes, and many other facts, could with equal consistency be disregarded, in order that ignorance of the existence of lodes or veins within the placer might be pleaded in excuse for their acquisition by that means. We assert that wherever developments or the natural appearance and formation of the country make it impossible for the existence of a lode to escape the information of any one who will give it a fair examination, the person who locates premises as placer ground without making such examination does so at his peril, and he cannot be heard. When we consider that Baldwin, Norris, Hayes and Bulkley all testified that the Goodell and Gardiner lodes are exposed to the Mike tunnel, that they must have been so exposed ever since the spring of 1877, and that no steps were taken or effort made to suppress knowledge of their existence, together with the additional fact that no attempt was made to contradict this testimony, the jury must have found as a matter of fact that they were discovered and exposed at the time of the application for the patent, and long anterior thereto. It also appears that every year subsequent to the discovery of these veins, the discoverers performed one hundred dollars worth of work

on each of them. It is true that no location of the claims had been made during this time, but it is equally true that such work must have directed the attention of the placer claimant to the condition of affairs in that neighborhood, and to the consequent necessity of apprising himself of the character of the ground and the existence of lodes therein, if any.

The means of acquiring knowledge and the position of the adjacent lode claims all justify the conclusion that if want of knowledge could have been proven, the plaintiff in error would not have hesitated to have done so. There can be no doubt but that in locating and applying for patent to a placer claim, William Moyer was acting for and in the stead of William H. Stevens: the testimony of Leonhardy shows it, and it is directly inferable from such parts of Norris's testimony as remains in the record, and from the testimony of Baldwin, that Stevens desired to secure as much territory in that section of the country as possible. The cases of Reynolds against the Iron Silver Mining Company before referred to show that such was his purpose. He knew, in all probability, better than any other man, what the ground contained, and even if he had intended to place an innocent and ignorant man between himself and the government, he could not, under the circumstances, take advantage of such innocence and ignorance, and thus by circumlocution defeat the purposes and objects of Section 2333.

This summary of the facts upon which the verdict of the jury is based, determines, in our opinion, that the grantors of the defendant in error, in acquiring Government title to the property, did so in such a manner and under such circumstances as to bring into full operation the excepting clauses of the patent and to exclude from it the Goodell and Gardiner lodes. If any other testimony upon the subject exists in the record, it must be found in the placer patent in the date of its application, and in the conveyance

by the patentee mediate and immediate to the plaintiff in error. If, as before stated, that is the only testimony offered by the plaintiff in error, it must stand or fall by the case it has made.

We come now to consider the contention that the Court committed error in the instructions refused and in those given to the jury.

At the conclusion of the defendant's testimony, the plaintiff in error requested the Court to instruct the jury to find a verdict for the plaintiff, because the Gardiner lode claim was not located or recorded until after the time when the application was made for the William Moyer patent, because the discovery shaft upon the claim was not sunk until late in 1879, long after such application, and because there was no discovery of any vein or lode of quartz, or other rock in place, bearing valuable deposits of any kind in such discovery shaft. This was the theory upon which the case was tried below, and the plaintiff in error seemed to consider that, since there had been no location of a lode claim anterior to its grantors' application, and since there was no lode in that particular working designated as the discovery shaft, it made no difference what the conduct of its own grantor was in obtaining the patent, or whether he had or had not knowledge of the existence of a vein somewhere else within the claim. The argument in this court, so far as that motion is concerned, is significant in itself.

This motion having been denied, the plaintiff in error, by its counsel, requested the giving of twenty separate and distinct instructions, all of which were by the court refused. Since the argument of Mr. Owers does not seem to discuss the assignment of errors committed in this refusal, it is not necessary for us to seriously consider them. The court did, however, instruct the jury very clearly and explicitly upon every proposition on which it was essential for them to pass, and those instructions have been arbitrarily divided into ten paragraphs, each of which forms the subject of a specific

exception. If we may judge from the argument of Mr. Owers, the first, third, fourth, fifth and seventh do not seem to be seriously challenged and it is not necessary to do more than briefly consider the others.

The Court first read Sec. 2333 of the Revised Statutes to the jury, told it that the plaintiff's title must prevail unless shown on the part of the defendant that there was a vein or lode in the territory covered by the Goodell and Gardiner locations at the time of the issue of the patent, that there must have been a vein or lode in such territory known to the patentee and Moyer, and a location upon it described in the pleadings and maps in evidence. The court then proceeded as follows:

"The evidence tends to prove that the discovery of mineral in these claims was made in the tunnel sometime in 1887, I believe. The locations were not made on the surface of the ground until 1879, about the first of February. That was after application for patent, and before the entry, which was about the 21st of February, 1879, and of course before the patent was issued. If there was a lode in that territory, and it was known to Moyer as an existing lode at this time—and by this time I mean the 1st of February, 1879, or at the time these locations were said to have been made—and the lode had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted by the terms of the statute from the provisions of the patent, and the owners of that title now have no right to them. So that the question for your consideration is of that character, whether prior to the date of these alleged locations, which was in the early part of February, 1879, a lode was known to exist or that Moyer knew of it at that time, and that locations were made upon it.

It has been said by counsel that if the lode had not been discovered in the discovery shaft that would defeat the defendant's title, and make good that of the plaintiff, but

that is not true. It was not necessary that it should be a location upon which the plaintiff could have resisted the claims of parties who were claiming under lode locations. It was enough that it was a visible and open location upon the surface, one which might be made good thereafter, if not then good, and a lode was known to exist—known to Moyer. When the statute speaks of it being known, it means known to the patentee.

"I would say something to you as to whether it was known to Stevens who subsequently became the grantee of this claim, and not to Moyer. But I think that the evidence tends equally to prove that it was known to Moyer if it was known to Stevens, therefore, I shall not raise any distinction upon that point. Perhaps there might be a distinction presented, but I do not think it is important in this case. If you find that it was known to Stevens I think you may find upon the same evidence, that it was known to Moyer. If it was not known to Moyer, then of course it matters not whether it was known to other people. The point upon this statute is that if the patentee of a placer claim knows of the existence of a lode within the placer at the time of making his entry and obtaining his patent, and does not include it in his application, does not proceed for that lode as a lode, thereby, under the terms of the statute, he makes a conclusive declaration that he has no right of possession of the lode, and that defeats his title altogether."

The errors said to be gleaned from these instructions are chiefly that the jury were told that if they believed from the evidence that Moyer knew of the existence of the Goodell or Gardiner veins on the first day of February, 1879, the jury should find for defendant; and that if the patentee of a placer claim knows of the existence of a lode within the placer at the time of making his entry and obtaining his patent, and does not include it in his application as a lode, he makes a conclusive declaration that he has no right of possession of the lode, and that defeats his title altogether. If the Court here committed no error, or having committed error it could have worked no injury to the plaintiff, the judgment should not be disturbed.

By the excepting clauses of a placer patent, the construction placed upon section 2333 by the Interior Department has been that all lodes, veins or ledges known to exist at the date of the patent and not included therein by express terms or express application, they are excluded therefrom. The term used is, All lodes, veins or ledges known or claimed to exist.

This court has decided that knowledge of the existence of a lode or vein must be had on or before the date of application. It has also repudiated the use of the word "claimed," as not being within the contemplation of the statute. It becomes desirable, therefore, to ascertain what is meant by the term "application for patent." To do so from the language of the statute is somewhat difficult. It is true that the term "application for patent," as technically used, relates to the action of the claimant in presenting his first papers for that purpose when they are filed and the order of publication granted. But the real time when application is made for patent is when the proof is presented of the performance of all the preliminaries required by law, and a tender of the amount required, with the request for certificate of entry; and this is probably the time which the statute seems to contemplate. It provides that "where the same person, or association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and, in such cases, a patent shall issue for the placer claim subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such lode or vein, and 25 feet of surface on each side thereof."

This is the time when the knowledge of the existence of a vein or lode was evidently fixed by this Court in Iron Silver Mining Company versus Reynolds. The filing of the first papers was made in November, 1878, and entry on the

21st day of February, 1879. Now if prior to the filing of the papers, these veins had been discovered and prior to the time when the ground was paid for, the claims were located and recorded, then the time fixed by the Court in its instruction and referring to the 1st day of February, 1879, is perfectly proper. This makes the construction of Section 2333 given to the jury not only proper but in keeping with the views above expressed: that if the patentee who seeks to obtain a patent under a placer location knows of the existence of a lode within the placer at the time of making his entry, and does not include it in ais application, he has no right of possession to it.

The proposition for which we contend is in perfect harmony with the decisions of the Court, and cannot in anywise prejudice any individual. While a claim properly located and patented "is property in the highest sense of the term," yet it is property in the same sense that any other unpatented premises are. The contention made by counsel that, because this Court has determined that a mining claim perfected under the law is property in the highest sense of the term, therefore knowledge of the existence of a lode must precede or accompany the date of application for patent for the placer, which proves too much. For, if that be so, then if it makes a location of a placer claim without any knowledge of the existence of a lode within it, but between the date of such location and the date of application of patent therefor, if he discovers one, it belongs to him absolutely, since having complied with the requirements of the statute in making his location, and thus acquired property in the highest sense of the term, it necessarily follows that knowledge interfering with the enjoyment of such property, to say nothing of its ownership, would seriously assail the integrity of what the law has already given him. In other words, knowledge of the existence of the lode before the location of the placer, would be absolutely necessary to give the statute any

operative effect whatever. It is far better to hold placer claims subject to the same principles which govern lode claims, and which make the title thereto assailable when the statute has not been complied with, or performed at any and all times prior to the date of entry.

But if we concede for the sake of argument that the time fixed by the Court for the acquisition of knowledge of the existence of these veins or lodes on Moyer's part was incorrect, it could not have in any wise damnified the plaintiff. The evidence is overwhelming, as we have seen, as to the time when these lodes were discovered, as to the existence of the tunnel in which they were cut, prior to the location of the placer, which must have been known and explored by Moyer or his agents, or rather by the agents of William H. Stevens through Moyer at the time of its location, application and entry.

As to the doing of the annual work by the discoverers of the veins as required by the Revised Statutes, and as to the obvious ability of Mr. Moyer to have found out by the exercise of the slightest ordinary prudence, every fact proven of record. It shows that he knew, or should have known, prior to his location and application, as well as prior to his entry and patent, of the existence of these veins, and in the language of the statute he must be held to have conclusively declared that he had no right of possession thereto. The fact, therefore, that the Court referred to the 1st of February as the date when knowledge should have been acquired, is immaterial, and could not have prejudiced the plaintiff in error in any particular. It is the law, as we understand it, that although the Court, in giving its instructions to the jury commits error, yet if it is of such a character as not to have worked any injury to the complaining party, the verdict of the jury and the judgment of the Court, will not for that reason be disturbed.

Decatur Bank vs. St. Louis Bank, 21 Wall., 294.
Johnson vs. Jones, 1 Black, 209.
Washington vs. Ogden, 1 Black, 451.

Chittenden vs. Brewster, 2 Wall., 191.
Brobst vs. Brock, 10 Wall., 509.
Allison vs. Insurance Co., 97 U. S., 144.

We insist that if any error was committed in the instruction given to the jury, it was error to our prejudice. The limitation of the question of knowledge to Moyer—the declaration in effect that though all others beside might be aware of the existence of these veins, yet want of knowledge upon his part might protect him and give him the property was so out of harmony with the language of the statute, with the construction of the Interior Department, and with the views expressed by this court upon the question, that we believe judgment would have been reversed if the verdict had been against us instead of for us, and we, instead of the plaintiffs in error, were here for a reversal.

The old, old charge of the acquisition of title by trespass is made against us here as it has been made by the plaintiff in error in every case of which we have any knowledge, tried below or which it has thus far brought to this court for review. It would be a saving of time and trouble if the counsel for plaintiff in error would have that part of his argument printed separately and attached to every brief which he files in this court. We have had it in plain and fancy dress, garnished with authorities and stated in the shape of axiomatic doctrine, to such an extent that we fear it is a mania with our friends on the other side. We are told that although the Government may except a vein from a placer claim, yet since nothing else is excepted it is a vein in land not belonging to the United States, and therefore not patentable, and any attempt to secure title to it is nothing less than a trespass. The judgment of Portia is again and again flaunted in our faces, and until this Court makes a decision directly upon the proposition, our friends will continue to be miserable.

We have never attempted to obtain title to the Goodell and Gardiner claims by founding it upon a trespass. It may be, in the opinion of the plaintiff in error, a trespass for any

man to aspire to the acquisition of a mining claim in Leadville without its permission, but beyond that there is no theory upon which the claim made can be based. It is a principle of law, as old as the law itself, that whenever anything is granted or reserved everything which is essential to the enjoyment of the thing so granted or reserved passes or is reserved with it. An acception of an acre of ground surrounded by lands conveyed necessarily carries with it the right of ingress and egress, and the reservation of minerals beneath the surface equally carries with it the right to their enjoyment. If it be true, as stated by counsel, that a lode claim or any claim unpatented but perfected under the law, is property in the highest sense of the term, which can be sold and conveyed and will pass by descent, it is equally true that a properiy located placer claim possesses the same attributes, and with such location is included everything not expressly excepted by the statute itself. The consequence is that if A locates a placer claim which he knows contains within its boundaries a vein or lode, and complies with the law in its location, he has a piece of property perfected under the law and in the highest sense of the term, in consequence of which no other man can obtain title to that vein without "committing a trespasss." If that is so, counsel has again attempted to prove altogether too much. If a placer mining claim, perfected under the law and unpatented is such property, and not subject to disposal by the government, and if, within its boundaries there is a known vein or lode, the position of counsel makes it, in other words, as fully and completely as exempt from location by others as though the claim were patented. If that is so, the question as to whether it is patented or unpatented is wholly immaterial, and counsel has established the proposition, in effect, that William H. Stevens, or any other man, could locate a thousand acres of placer property, containing a score of rich veins, known to exist, and make it impossible for any other citizen to locate a single one of them, since to go upon the placer claim for that purpose

would be to commit a trespass, and no title can be founded in trespass.

We may, however, assume the correctness of counsel's position, but it has no application whatever to the case This question is not one of title in the defendants in error, so much as it is of title in the plaintiff in error. The action is ejectment, and the plaintiff must succeed upon the strength of his own title; not on the weakness of ours. Its patent either gives it the property in dispute, or it has no right to it, even as against a trespasser. The Court well said in its instruction: That the validity of our location as opposed to other lode claimants was immaterial—knowledge of the existence of the vein by Moyer at the time of his entry is everything. In the case of Reynolds vs. the Iron Silver Mining Company, 116 U. S., 687, the Court in express terms lays down the doctrine that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. The title remaining in the United States, the existence of which was known, the patentee has no such interest in it as authorizes him to disturb any one else in the peaceful possession and mining of such vein. When it is once shown that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title or is a mere trespasser, it is certain that he is in possession, and that is sufficient defense against one who has no title at all, and never had any. Respectfully submitted.

T. M. PATTERSON,
C. S. THOMAS,
CLINTON REED,
Atty's for Def't in Error.

FILED,
NOV 12 1891
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

Nos. 6, 7, and 16, OCTOBER TERM, 1890.

THE IRON SILVER MINING COMPANY, *Plaintiff in Error.* **6** *vs.* THE MIKE AND STAR GOLD AND SILVER MINING COMPANY.	
SAME, *Plaintiff in Error,* **7** *vs.* SAME, *Defendant in Error.*	IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.
JOHN L. SULLIVAN, *et al.*, *Plaintiffs in Error,* **16** *vs.* THE IRON SILVER MINING COMPANY.	

BRIEF FOR DEFENDANTS IN ERROR IN Nos. 6 AND 7, AND FOR PLAINTIFF IN ERROR IN No. 16.

On Re-Argument Under an Order of the Court.

T. M. PATTERSON,
Attorney for Defendant in Error.

RAMSEY & BISBEE, PRINTERS.

Supreme Court of the United States

Nos. 6, 7, and 16, OCTOBER TERM, 1890.

THE IRON SILVER MINING COMPANY, *Plaintiff in Error.* **6** *vs.* THE MIKE AND STAR GOLD AND SILVER MINING COMPANY.	
SAME, *Plaintiff in Error,* **7** *vs.* SAME, *Defendant in Error.*	IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.
JOHN L. SULLIVAN, *et al.*, *Plaintiffs in Error,* **16** *vs.* THE IRON SILVER MINING COMPANY.	

BRIEF FOR DEFENDANTS IN ERROR IN Nos. 6 AND 7, AND FOR PLAINTIFF IN ERROR IN No. 16.

On Re-Argument Under an Order of the Court.

The following is a copy of the order of the Court to guide counsel in the re-argument of the above several causes:

"It is ordered that these cases be re-argued before a full court, and then as one case. And the attention of counsel is specially directed to the discussion of the following questions:

"*First.* What constitutes a 'lode or vein' within the meaning of Sections 2320 and 2333 of the Revised Statutes?

"*Second.* What constitutes a 'known lode or vein' within the meaning of Section 2333?

"*Third.* In what manner must the existence of such lode or vein be indicated to enable the applicant for a placer patent to describe it, and tender the price for it per acre, required by the Government?

"*Fourth.* Whether the existence of such lode or vein must be known, and its purchase applied for when the application is made for the placer patent, and whether a lode or vein will be excluded from the patent, which is discovered after such application and before the patent is issued?

"*Fifth.* Whether evidence of the existence of lodes or veins in the immediate vicinity of a placer claim is admissible to the jury, as tending to show the existence of such lode or vein within the boundaries of the claim? and—

"*Sixth.* Whether there was any legal evidence for the jury of the vein or lode claimed by the defendant in error in the first two cases, Nos. 6 and 7, or by the plaintiffs in error in the third case, No. 16?

"Counsel of the parties are requested to produce on the re-argument models and diagrams showing the position and form of the placer claim of the plaintiff in error in Nos. 6 and 7, and defendant in error in No. 16, and the position in it of the alleged lodes of the defendant in error in Nos. 6 and 7, and plaintiffs in error in No. 16, and also of the tunnel alleged to run into the said claim, and also of the adjoining land so far as may be necessary to a full understanding of the questions involved."

I.

What constitutes a "lode or vein" within the meaning of Sections 2320 and 2333 of the Revised Statutes?

The Statutes have not defined a "lode or vein" whether ore bearing or other kind. It is manifest that Congress was legislating about a thing, the meaning of which was generally understood by those who were interested in the things—that is, in lodes or veins carrying valuable metals.

But there are lodes or veins other than those valuable for metals, so Congress expressly declared the kind of lodes or veins it was legislating about in the following language:

"SEC. 2320. That mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits."

The section then prescribes the length along the vein or lode that might be taken up or located, and the width of surface ground that might be taken up or located in connection with the vein or lode.

But the subject of the section is clearly "veins or lodes

of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits."

If the order of the words is changed so that the sentence will read "veins, lodes or deposits of rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable" ores, the sense is no wise changed, while the meaning is somewhat cleared.

It was in that way Mr. Justice Field read the section in the celebrated Eureka case, reported in 4 Sawyer, tried on the Circuit, with the Circuit and District judges also sitting. Since that case the bench and bar have accepted Mr. Justice Field's interpretation of that part of the language of Section 2320, under discussion, as the best and clearest ever given—and since, to rightly answer the question must necessitate resort to the same reasonings and must lead to the same conclusions found in the charge to the jury in that case, what Mr. Justice Field said upon the subject is here copied in full. He said, speaking of the several acts of Congress:

> Those acts give no definition of the term. They use it always in connection with the term vein. The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming a "vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." The act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the term should, therefore, be sufficiently broad to embrace deposits of the several metals or ores herein mentioned. In the construction of statutes general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is, that of a fissure in the earth's crust filled with mineral matter, containing ores in fissures. (See Von Cotta's Treatise on Ore Deposits, Prime's Translation, 26.) But miners used the term before geologists attempted to to give it a definition. One of the witnesses in this case, Dr. Raymond, who for many years was in the service of the General Government as Commissioner of Mining Statistics, and in that capacity had occasion to examine and report upon a large number of mines in the States of Nevada and California, and the Territories of Utah and Colorado, says that he has been accustomed, as a mining engineer, to

attach very little importance to those cases of classification of deposits which simply involve the referring of the subject back to verbal definitions in the books. The whole subject of the classification of mineral deposits he states to be one in which the interests of the miner have entirely overriden the reasonings of the chemists and geologists. "The miners," to use his language, "made the definition first. As used by miners, before being defined by any authority, the term lode simply meant that formation by which the miner could be led or guided. It is an alteration of the verb lead; and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode." The term lode-star, guiding-star, or north-star, he adds, is of the same origin. Cinnabar is not found in any fissure of the earth's crust, or in any lode, as defined by geologists, yet the acts of Congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. Any definition of lode, as there used, which did not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver. The definition must apply to deposits of all the metals named, if it apply to a deposit of any one of them. Those acts were not drawn by geologists or for geologists; they were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms vein and lode in connection with each other in the act of 1866, and their use in connection with the term ledge in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts which a scientific definition of any one of these terms might impose.

It is difficult to give any definition of the term as understood and used in the acts of Congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it would equally constitute, in his eyes, a lode. We are of the opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by

counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process.

It will be observed that Mr. Justice Field does not repudiate the definition of a lode as given by the geologists; that is, "A fissure in the earth's crest filled with mineral matter;" a formation "containing ore in fissures." While adopting the scientist's definition, he says: "That is too narrow; it is good enough as far as it goes, but it does not follow because 'rock in place bearing gold, silver, cinnabar, etc.,' is not found in a fissure it does not constitute a lode; on the contrary, while holding on to the scientific definition, there must be added another situation of the precious metals that will constitute a lode, which is, '*All deposits* of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process.'"

There are but two classifications by Congress of the form in which the ores are found. These are arbitrary, and are made to enable the Government to dispose of the lands in which they are found and the citizens to acquire title to them.

The first is the classification of Section 2320: "Veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits;" and the second is that of Section 2329, being the first section of the act of 1870, as follow: "Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place."

The distinguishing feature of the two classifications is "quartz or other rock in place." It seems clear that wherever gold, silver, cinnabar, lead, tin, copper or other valuable metal is found in quartz or other rock *in place* there is a lode within the meaning of Congress, and

when they are found in or out of rock, the rock not being *in place*, there is a placer.

The meaning of "rock in place" is "rock within defined boundaries in the general mass of the mountain." This definition the lamented late Justice Miller gave in *Stevens* vs. *Williams*, tried on the Circuit, 1 McCrary, C. C., 488. It is a terse but comprehensive and complete definition. When "rock bearing gold, silver," etc., is found "within defined boundaries in the general mass of the mountain," a lode exists. It is a lode within the scientist's definition, and also within that of Mr. Justice Field's in the Eureka case.

Placer ground usually consists of rock not "in place" with gold or other metals commingling with it. Gravel, sand, broken rock, clay are all rock, but not in place. It has been moved from its original relation to the solid formation with which it had been connected, by the action of the elements or other disturbing causes. Thus found, though in connection with gold or other metal, it is not a lode vein or other deposit of rock in place; hence it can not constitute a lode or vein within the meaning of Section 2320. It constitutes the second member of the classification made by Congress.

If the rock is "in place," as where it constitutes the filling of a crevice, it makes no difference whether it is hard or soft, broken or solid. Much of vein filling is quite soft or very much broken. Since fissures in the earth's crust are usually the result of violent rending of the rocks by great dynamic force originating in the interior of the globe it follows that such fissures are likely to be filled with a crushed and broken mass of rocks; and these fissures becoming the channels through which the thermal waters carrying precious metals in solution flow, their contents become associated with the metals which are deposited in them by precipitation or other

chemical process, and thus the contents of the fissures become "rock in place," bearing silver, etc. This, of course, is only one form of vein or lode.

While in the Eureka case the lode in controversy was a mineralized body of limestone a mile and over long and in places 800 feet and over wide, it was not in crevice or fissure, but was a member of the geological formation of the country. It was a mass of limestone with quartzite on one side and shale on the other. The lode claims were not located along this lode, but within its surface area and upon cracks or fissures which being followed led to the chambers of ore that were disseminated throughout the limestone body.

The statute does not fix the thickness or the thinness of the lode or vein—the richness or poverty of it. The words "or other *valuable* deposits" explain or designate the character of the metal which must be deposited in the rock found in the fissure; that is, it must be gold—that is a valuable deposit, or silver, or copper, or cinnabar, or iron—iron is a valuable deposit within the meaning of the statute. But the statute does not state that the lode or vein must be valuable enough to pay for working; that it must be capable of yielding a profit. It simply means that a metal considered valuable shall be deposited in the rock in place.

Were it otherwise but few veins or lodes could be patented. Miners locate and patent lodes and veins although they can not extract ore from them at a profit. They do so because they have discovered something that a miner may follow in expectation of getting pay ore. Their expectations may or may not be realized, but the result does not determine whether they have a lode or not—it does determine whether they have a lode that pays or not. But that has never been the test.

To illustrate: No lode or vein has the valuable ore

distributed equally through it. Some lodes are many feet wide and then pinch or narrow up until the crevice is only the width of a knife blade. The pay ore may be in chutes or pockets, the chutes but few feet in width, the pockets far apart, but connecting them all there is the crevice—narrow it may be, but a miner might not hesitate to locate on a mere knife blade seam, for by following it he would expect to find chutes or pockets of ore that would pay him for all his loss and trouble.

Take a claim covering 1,500 feet of a crevice longitudinally. Within the claim the crevice is wide and carries pay ore from the surface down; there is no question but that it is a lode or vein within the meaning of the Statute. But where the lode leaves the end lines of the claim on the surface, it becomes narrow and for the next 1,500 feet is no more than an inch or two inches in width at the surface and the mineral matter within it is very poor—carries but $10 or $5 in gold or silver to the ton. No miner would assert for a moment that its identity as a lode because of this variation was lost and it would be instantly located by hundreds of miners because though narrow and poor at the top it might at 100 or 500 feet below the surface open up and become very rich. The right to locate and patent such a lode is unquestioned—the only limitation being that $500 worth of work shall be done upon it.

In *Stevens* vs. *Williams*, 1 McCrary, 488, Mr. Justice Miller used the following language:

"I say to you further, gentlemen, that the thinness or thickness of the matter in particular places does not affect its being a vein or lode; nor does the fact that it is occasionally found in the general course of this vein or chute in pockets deeper down into the earth, or higher up, affect its character as a vein, lode or ledge. * * * All the witnesses agree that there is a substratum of limestone and a superstratum of porphyry;

all agree—even defendant's witnesses—that they came to a point where that contact is so narrow that only a sheet of paper could be got into it, but still it has the well-preserved distinction—the porphyry above, the lime below, and although in some instances to the south, some to the north and some occasional spots in the levels, it is stated by defendant's witnesses that no more vein matter has been found. * * * If you find that to be true, why, notwithstanding these casual interruptions in various directions, notwithstanding the widening, the narrowing, the deepening and the shallowness of the vein; notwithstanding it has in some places acknowledged diversions down into the ground, still, if the miner is able to pursue and has been able to pursue it in the vein, notwithstanding these interruptions, you are to call it a vein, and treat it as a vein within the meaning of the act of Congress."

It will not do to adopt a more definite definition of a "lode or vein," as referred to in Section 2320, than has been in the Eureka case, in *Iron Silver Mining Co.* vs. *Cheeseman*, and in *Stevens* vs. *Williams* supra. It is necessary to leave it precisely where Congress did, since, as development of the mining country progresses, deposits of mineral in rock in place are being discovered in varied forms and conditions—strange, when compared with those developed when the mining laws were adopted. Under the definitions as they stand they may readily be classified. Make them more definite or restricted and the miners and the courts will be at once at sea without rudder or compass, and confusion must ensue.

After all, under instructions modeled upon existing decisions, the jury is the proper tribunal to determine whether a given body of mineral is or is not a vein or lode. Absolute accuracy can not be attained, but with the guides this court and its judges have given us, an intel-

ligent jury can not go far astray, and the minimum of injustice will be inflicted.

II.

What is "a known lode or vein" within the meaning of Section 2333 of the Revised Statutes.

In the first place it is clear that it is precisely the kind of a vein or lode referred to in Section 2320. It says so in so many words and being so definitely designated argument to establish that it is is out of place. Taking the lode as described in Section 2320, the question is what will constitute such a one "a known lode."

By Section 12 of the act of 1870 it is provided "That *claims* usually called 'placers,' including all forms of deposits, *excepting* veins of quartz or *other rock* in place, shall be subject to entry and patent under this act."

It has been the clear purpose of Congress at every point to guard against a placer patent conveying a vein or lode, except in the specified cases. In the above section it clearly excludes title to lodes and veins from passing by such patent. The placer claimant is thus warned at every turn.

Next we come to the act of 1872, Section 2333, General Statutes.

This section nowhere confines the knowledge of a lode to the placer applicant; if it does, it must be by necessary implication.

And it certainly does not by necessary implication.

It is fair to assume that if Congress intended to except from a placer patent only such lodes as were known to the applicant it would have so declared.

But if, to give effect to the section, that must follow as a necessary implication, then it was not necessary to have so declared. But it is not necessary that it should follow to give effect to the section.

The fair interpretation of the language is that if a vein or lode is known by *any one* to exist within a placer claim a placer patent will not convey the title. The applicant applies for patent, at his own risk; a vein was known to exist at the time and it can be so shown; somebody else may acquire the title, notwithstanding the the placer patent.

But give the section a more liberal construction for the placer patentee. A lode may certainly be said to be "a known lode" when the fact of its existence is known generally; that is, it is so notorious that miners *generally* have knowledge of its *locality*.

It will be claimed that a lode can not be "a known lode" within the meaning of the statute unless it is known to the placer owner.

Congress could not have so intended, else (1) it would have said so, and (2) because of the manifest impossibility of bringing knowledge home in the great majority of instances to the placer applicant.

Say the lode is a blind lode; that is, its top or apex is covered with the ordinary wash or slide of the country. The placer applicant may have explored sufficient to satisfy himself that his lode is a mile in extent—by sinking a pit here and there along it—he and members of his own family may have done this, or he and an association of persons, who, under the placer law, take up conjointly as much as 160 acres of placer land. The placer claim need not be square; it may be as irregular in boundaries as the meanderings of the apex of the lode, and although the sole purpose was to secure the lode by the patent, it would be impossible to show the lode was known to the patentee or either of them.

Or, say the lode is patent on the surface, but the placer claimant pleads ignorance of the fact that it was a lode. Everybody with any knowledge of a mining country

knows that it most frequently requires an expert to determine that a protruding ledge of rock carries gold or silver. This is demonstrated every day in a mining country. The reason is that any strata or portion of rock harder than the surrounding rock is left protruding, by the action of the elements. They wear away the softer rock more rapidly than the harder; hence in the great majority of cases it requires the work of the assayer to determine whether the protruding ledge is a vein or lode.

Then, again, as at Leadville, the existence of the great deposits there were first determined by what is denominated "float rock;" that is, parts of the lode filling as the surrounding rock was scored away by the elements, were also broken off and carried down the mountain. In California gulch there were great quantities of this "float rock," but it was not until after 1870 that a miner came along who suspected that this float was something more than fragmentary, barren rock. He caused it to be assayed, found that it yielded both lead and silver, and the discovery of the great underlying lode was then but a matter of time and patience.

It was demonstrated very early in Leadville mining that this lode or deposit of lead and silver existed on the top of and in the great underlying body of limestone. This limestone formation was almost flat and extended for miles north, south, east, and west. It was covered generally with porphyry rock, sometimes at a depth of five hundred feet and more, but the miner soon learned that all he had to do was to sink his shaft through this overlying body of porphyry to the limestone and he would find the mineral. Sometimes the ore was thin and poor, at other times it was thick and rich; in any event the miner knew that when he reached the limestone all he had to do to find plenty of ore was to drift on this limestone.

Now, say a miner located 50 acres of this land for placer. He had never sunk a shaft through the overlying body of porphyry and he did not *know* by actual demonstration that the lode or ore body extended throughout his claim, but the formation—that of limestone below and porphyry above and upon it did—and this must have been known to every one who had given any attention whatever to the formation. But it was demonstrated that the mineral existed between the limestone and porphyry to the very line of the placer and to all appearances it extended into the placer. This was on one side. Say the same thing was demonstrated on each of the other three sides of the placer. Now, no one had ever sunk to the limestone within the placer, nor had any one drifted on the limestone into the placer from adjoining claims. But could there be any doubt under such circumstances that within the placer was the same lode that was on all sides of it?

Now, suppose the locator of this placer claim willfully fails to develop the claim for the lode, failed to sink a shaft, failed to run the levels or drifts on surrounding claims into his own ground—deliberately, willfully failed to do these things—would the court permit him to steal this land, not only from the Government, but from the miners; not only at half the price, but in unlimited quantities? As a lode claim he could locate less than ten acres, though there were a score interested with the locator. They could locate a claim of 1,500 feet long and 300 feet wide. Upon each lode claim not less than $500 worth of work must be done, a separate plat and survey made and filed, notes prepared, while as a placer claim one man might locate twenty acres and eight persons might locate 160 acres in one claim and to secure a patent an indefinite number of 160 acre tracts might be united into one claim, and on this one claim—it might be of

1,000 acres or more, but $500 worth of work in all would be required and one survey, one plat, one set of filed notes would answer to secure a patent.—*Iron Silver Co vs. Kemp.*

Therefore *a known lode* should be held to be *a lode.*

1. That had been discovered by any one.
2. A lode, the existence of which was generally known.
3. A lode that in fact exists, and the existence of which ordinary prudence and mining skill, incited by known facts, would have readily discovered.

It may be claimed, as it has been in the past, that a known lode is an existing located lode, and can be none other under the statute.

Such a proposition is an absurdity. It imposes a condition not warrented by the statute—that is, the lode must not only have been discovered, but some one must also "locate" it before any obligation arising out of its known existence is imposed upon the applicant for a placer patent.

A point is made that, under the acts of Congress, the owner of a lode claim by discovery and location is entitled only to the enjoyment of the surface of his claim—he has no right of possession beneath the surface, except to the lode. This position can not be maintained in view of all legislation upon the subject. Section 2319 declares that all valuable mineral deposits in land belonging to the United States are open to exploration and purchase, "and *the lands in which they are found to occupation* and purchase." Section 2320 prescribes when and of what area a lode mining claim shall exist. Section 2322 prescribes the rights of the lode claim locator. It is true it declares that the locator of a lode claim "shall have the exclusive right of possession and enjoyment of all the *surface* included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or

apex of which lies inside such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of said surface locations;" but a fair inference from the context is that the word "surface" was not used to limit the rights of the locator to the surface, technically speaking, but rather as a term to distinguish the land from the lode. So far as mere land or earth is concerned the locator is limited to his side lines; but under the proper conditions he may follow and possess his lode, even though it passes beyond the land within his boundary lines in its downward course.

Certainly this is the construction placed upon it by miners everywhere. The right to exploit the ground by shafts, tunnels, drifts and the like is always exercised and always protected. Upon what authority, so far as decisions go, this claim is based is not given. I know of no decision laying down such a rule.

But whatever may be said of the rights of locators of lode claims beneath the surface, the rights of placer locators beneath the surface can not be doubted. The very purpose of taking up a placer claim is to work or "wash" the earth from the surface as far down as inclination leads to abstract the gold it may contain. There is, and from the nature of the case can be, no limitation upon a placer locator in the enjoyment and possession of all the land within his claim, to any depth; for his location is made that he may enjoy and possess it through excavations, washings, and such other methods of working it as judgment may suggest; and in doing this the entire surface—the ground to any depth—may be actually removed to another locality, only providing the property rights of others shall not be interfered with.

This consideration is important in determining whether

a "known lode" within a placer claim must be an existing located lode.

Suppose a placer location with a lode discovered within it before patent. There is no right given to another to enter upon the surface of the placer to locate a claim upon this lode. The placer locator is certainly entitled to the exclusive enjoyment and possession of the surface of his claim before patent. Then how can a lode discovered within a placer claim before patent is applied for be located by a third party? It is impossible that it should be done. A lode claim can only be located by marking its boundaries upon the surface. It must be distinctly marked on the ground so that its boundaries can be readily traced and the claim must be recorded, and the record must "contain the names of the locators, the date of the location and a description of the claim or claims located by reference to some natural object or permanent monument." [Section 2324, Revised Statutes.] So it is manifest that, though a lode within a placer claim is known to exist, no third party can go upon the placer to locate it. A placer claim may be located so as to surround an existing lode claim, but a lode claim can not be located by a third party within an existing placer claim.

The placer locator being protected from intrusion by third parties the question arises, why should he, if the contention of plaintiff in error is correct, locate a known lode within his placer claim, and when he applies for his placer patent make the statement that his claim includes such vein or lode? If a stranger could not make a location upon it, and he does not, the moment he applies for his placer patent that moment the "known lode" becomes an "unknown lode" within the meaning of Section 2333, and his title to it at $2.50 an acre is as perfect as though he had made the necessary state-

ment concerning it in his application and paid $5 per acre for it to the Government. The proposition, as stated at the outset, is an absurdity.

But so far as this contention by plaintiff in error is concerned, this court has fairly and repeatedly decided it against him.

Sullivan et. al. vs. The Iron Co., 109 U. S., 550.
Reynolds et. al. vs. The Iron Co., 116 U. S., 687.
Iron Co. vs. Reynolds et. al., 124 U. S., 374.
Noyes vs. Mantle, 127 U. S., 348.
U. S. vs. Iron Co., 128 U. S., 673.

IV.

In what manner must the existence of such a lode or vein be indicated to enable the applicant for a placer claim to describe it and tender the price for it per acre required by the Government?

1. If it is "a known lode," though not known to the placer claimant, then, of course, he can not describe it, and he can not obtain title to it. This is the misfortune of the placer claimant. It is not the fault of the courts that the law is such. It is the fault of Congress. The courts should not legislate, because Congress has failed to legislate.

It must be admitted that Congress had the power to provide for the granting of its mineral lands in this way, and if it has so legislated the court is powerless to make it otherwise.

If it is a lode known to the claimant, probably all that is necessary is that its general direction through the claim may be learned. This the claimant may readily discover by exploration along the surface, sinking through the wash at several points and finding its apex. If it is nec-

essary to describe the *lode claim* within the placer claim, it might readily be done by finding the general course of the lode, its length through the placer claim, and then by marking off a strip of ground fifty feet wide, including the lode—the length of the lode within the placer claim—and describe this tract in the placer patent as the lode claim purchased with the placer.

If it should be deemed necessary to describe the lode claim with the same accuracy as though it was not within a placer claim, it is for the claimant to do this. The burden devolves upon him under the law. It is a matter about which the Government need not disturb itself. If he wishes to locate his lode claim with such accuracy as that he may follow it on its dip outside of his claim and into the land adjoining; he must develop the ground, run exploit workings and find its course and distance. If he fails to do this it his misfortune, not the law's omission. In other words, when a lode does exist, and by ordinary skill and diligence he might find it, or, when he knows of its existence, it is *for him* to do whatever work is necessary to be able to describe it with the necessary accuracy. If he fails to do this it his fault and he should suffer.

Considering the mining laws as a whole, it is evident that the locator of a placer claim is protected in his possession of a lode within his claim until he declares, by omitting it in his application for a patent, that he has no right to its possession. The law proceeds upon the theory that a placer locator will probably apply for patent to the lode when he applies for patent for his placer claim—at least it gives him that privilege; and until, by omitting it in his application, he abandons it, nobody has a right to interfere with his possession of it.

V.

Whether the existence of such lode must be known and its purchase applied for when the application is made for the placer patent, and whether a lode or vein will be excluded from the placer patent after such application and before the patent is issued?

Plaintiff in error contends that if the existence of the lode is not known at the date of the *application* for a placer patent; that is, at the time the first written formal writing asking for a patent is filed in the register and receiver's office, then the title to the lode is carried by the patent, even though knowledge of its existence was obtained before either payment for and entry of the claim or the issuance of the patent.

This is a clear distortion of the law:

What Section 2333 requires is, that the application *shall* contain the statement that the placer claim includes the vein or lode.

This statement may be incorporated in the application at any time before entry and patent.

The application for a patent is a continuing act; it extends over at least sixty days.

Section 2325 of the General Statutes fixes the steps to be taken before patent can be granted:

1. Previous to the filing of a formal application the claimant must procure a plat and field notes of the claim from the surveyor general; he must post a copy of this plat, with a notice of his application for a patent, in some conspicuous place on the claim.

2. He then files his application for a patent, accompanied by the affidavit of at least two persons that such notice has been duly posted; and a copy of the notice.

3. The Register then publishes a notice that such application has been made, for sixty days in a newspaper, and

he must post the notice in his office for the like period of sixty days.

4. *At some time during this sixty days*—it may be the last of them—the claimant must file with the Register a certificate of the Surveyor General that $500 worth of work has been done on the claim; that the plat is correct, with such further description of it as will identify the claim.

Then, and not until then—only after all these requirements have been observed—can the application for a patent be granted; and the granting of the application is indicated by permitting entry of and payment for it.

So that the application for patent must be pending or continue for at least sixty days after the formal writing is filed.

Now, at any time during this period before the entry is made or patent issued this application may be amended, or it may be withdrawn; procedure under it is wholly at the option of the applicant.

Let what we contend for be demonstrated by an entirely supposable case:

Say the locator of a placer claim knows of the existence of a lode or vein within it, but he considers it of so little value that he is not willing to pay $500 an acre for the twenty-five feet on either side of it, so he makes application for a patent for the placer claim and omits all reference in his application to the vein or lode. In doing this he knows that it will be taken as a conclusive declaration that he has no right to the possession of the lode.

But before the sixty days expire he changes his mind and prefers to own the lode and get title for it—no third person has in the meantime taken any steps to locate or claim it—would any one doubt his right, either—

1. To amend his application so as to include such vein or lode; or,

2. To dismiss his pending application and commence anew, including in his new application the vein or lode?

If this be the right of a claimant then certainly, if, after he makes formal application and before proceedings under it are concluded, while he has the right to withdraw his application or amend it, he discovers a lode which he desires to own, his application for a patent must be made to conform to the Statute or he can not obtain title. It is clearly in his power to amend or to dismiss and commence anew, for nothing he has done prior to entry of the claim binds him to proceed either to entry or patent.

That the right to amend an application for patent exists, has never been doubted. The following is a common case: A makes application for a patent. Before the expiration of 60 days' notice B files an adverse claim, asserting title to a portion of A's claim. A concedes B's claim, he amends his application, survey, &c., &c., and proceeds to obtain patent for his claim diminished by the part of it claimed by B.

As stated before all that the Statute requires is that the *application* shall state that the placer contains a lode or vein—the application as it stands when entry is made or patent issued. The last paragraph of the section is significant, showing the intent of Congress. It is: "But where the existence of a vein or lode in a placer claim is not known, *a patent* for the placer claim shall convey all valuable minerals and other deposits within the boundaries thereof."

It is the *patent* that conveys the lode, not the location of the claim, nor the application for a patent, nor the entry of the claim. If A locates a placer claim containing within it a lode, the placer location gives him no title to it. The application for a placer patent gives him none, the entry of the claim gives him none—it is and can be only the patent. This clause, it seems to us, is a clear

declaration by Congress that if the existence of a lode becomes known before a patent is issued for the placer claim, the application must ask for the lode or it will be lost to the placer-owner.

We submit, therefore—

1. That if the lode becomes known at any time before *the patent issues*, the application must be made to apply for it or no title passes by the patent.

2. That if the existence of the lode becomes known at any time before payment for and entry of the claim, the application must be made to include the necessary statement, or the lode is lost to the placer claimant.

The foregoing discussion is offered because the court requests it. But defendant in error most earnestly contends that long before the application was made and before entry of the claim the existence of the great underlying lode was known, and also that of those in the tunnel—known generally and known to Moyer and Stevens, and if the latter was not *known*—actually known at the time of the survey for the patent, which must necessarily have been before the filing of the application—it was because of deliberate and gross indifference, a determination upon the part of Moyer and Stevens not to learn of it. The tunnel was on the claim; its dump was patent. They knew it was not theirs; if they had entered it as they should have done, they would have seen it.

In addition, before entry of the placer claim, the lode claims were staked upon the surface of the ground, but in defiance of it all they proceed to patent, knowing that in doing so the statute declared it to be a conclusive declaration that they had no right to the lode claims. The language of the statute is, that "When a vein or lode, such as is described in Section 2320, is known to exist within the boundaries of a placer claim, an application

for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim."

VI.

Whether evidence of the existence of the lodes or veins in the immediate vicinity of a placer claim is admissible to the jury, as tending to show the existence of such lode or vein within the boundaries of the claim?

The existence or non-existence of a lode or vein is a fact to be proven as is any other fact that is the subject of legal controversy.

The principal matter in controversy on the trial below was whether or not there was a vein or lode within the Moyer placer and whether or not it was a known lode or vein.

The proofs went to the existence of at least two or more lodes—one the great underlying lode or deposit of mineral throughout that section of country, and the other the lodes or veins that were cut and disclosed in the Mike tunnel.

As to whether such lodes existed and as to whether their existence was known, were questions of fact submitted by the court to the jury.

Let some dates be here fixed:

The date of the *location* of the placer claim nowhere appears in the record.

The formal application for patent was filed in the Register's office Nov. 13, 1878.

The entry for patent and payment was made Feb. 21, 1879, more than three months after the application was filed. This is shown by recitals in the patent. [Folio 40.]

The patent was executed Jan. 30, 1880.

The Mike tunnel was run and completed in the spring of 1877 and the lodes were cut and disclosed in it in February, 1877, so that the lodes in the tunnel were "known lodes" nine months before application for the placer patent was filed.

The Gardner and Goodell lode mining claims were located upon the 1st day of February, 1879, or twenty days before the entry and payment was made of the placer claim.

So that, when Moyer entered and paid for the placer claim, the Goodell and Gardner lode claims had been located within it for twenty days—this is shown by the location certificates of the Gardner and Goodell claims, which plaintiff himself introduced on the trial below. [Folios 59-60.]

In this connection, to show that every question of fact was fairly submitted by the court to the jury, the instructions of the court are here quoted in full, and are as follows: [Folios 139-144.]

"The Statute under which the plaintiff's title was obtained reads as follows: (Here the court read section 2333 entire, and the court then continued.)

"The patents shown by plaintiff must prevail in these suits unless it has been shown on the part of the defendant that there was a vein or lode in the territory covered by these locations, which are called the Goodell and Gardner, at the time of the issuance of the patent.

"There must have been a lode or vein in that territory known to the patentee, William Moyer, and there must have been location made upon it, as described in the pleadings and maps which have been put before you.

"The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel some time in 1877, I believe. The locations were not made on the surface of the ground until 1879—about the first of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and, of course, before the patent was issued.

"If there was a lode in that territory, and it was known to Moyer as an existing lode at this time, and by this time I mean the first of February, 1879, or at the time these locations were said to have been made, and the lode had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted by the terms of the statute from the provisions of the patent, and the owners of that title now have no right to them.

"So that the question for your consideration is of that character, whether prior to the date of these alleged locations, which was in the early part of February, 1879, a lode was known to exist, or that Moyer knew of it at that time, and that locations were made upon it.

"It has been said by counsel that if the lode had not been discovered in the discovery shaft, that would defeat the defendant's title and make good that of the plaintiff; but that is not true. It was not necessary that it should be a location upon which the plaintiff could have resisted the claim of parties who were claiming under lode locations. It was enough if it was a visible and open location upon the surface—one which might be made good thereafter, if not then good; and a lode was known to exist—known to Moyer. When the statute speaks of its being known, it means known to the patentee.

"The point upon the Statute (Section 2333) is, that if the patentee of a placer claim, one who seeks to obtain a patent under placer location, knows of the existence of a lode within the placer at the time of making his entry and obtaining his patent does not include it in his application, does not proceed for that lode as a lode thereby under the terms of the Statutes, he makes a conclusive declaration that he has no right of possession of the lode, and that defeats his title altogether.

"I think that is all, gentlemen, that there is in the case. I do not know that it is necessary to repeat it again that the plaintiff's title must prevail, unless it appears to you from the evidence that there was a lode existing in the ground, and that Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it in a general way, that there was a certificate made, that there was a discovery of mineral

within the claims, and that the lode was staked upon the surface and the like."

Although the instruction of the court and the dates of events heretofore given may not seem pertinent to the query being answered, yet I think they are, as they serve to show the principles upon which the case was tried, which will help to determine whether or not evidence of the existence of other lodes was admissible.

The court did not determine for the jury whether or not there was a lode, and whether that lode was known or not; it left the jury to determine these things.

If the testimony should show that a lode—a fissure lode—extended for a long distance without a placer claim, and up to the very line of the placer, and where it was last developed at the placer line there was no evidence of its termination, but it appeared to continue into the placer claim—though whether it did or not was not positively known—certainly such facts would be admissible as tending to prove that the lode did extend into the placer.

If the upper formation of a defined area of country of considerable extent consists of a stratum of limestone several hundred feet in thickness and a stratum of porphyry varying from a few to several hundred feet in thickness on top of that, and wherever the porphyry had been penetrated by shafts or other workings to the lime, a bed of ore was found lying upon the lime, between it and the porphyry, there would exist a reasonably strong presumption that a lode existed throughout that area of country, and this presumption would increase with the number of penetrations and discoveries of the ore body by means of them. Now, suppose within this area a placer claim containing fifty acres should be located; that lode claims existed on each side of the placer and shafts had been sunk on them close to each of the four

placer lines, each of which disclosed the same lode between the limestone and the porphyry, would not such facts be almost conclusive proof that the same lode existed throughout the placer? It would be almost as conclusive as though the two ends of a nail were seen protruding from both sides of an inch board—one directly opposite the other—were the question whether or not they were the ends of one nail which was driven through the board.

A man is found dead. It is legal to establish two things by circumstances: 1. That the man was murdered; and 2. Who it was that committed the murder? The majority of men who suffer death for the crime of murder do so upon circumstantial evidence. No human eye saw the crime committed, yet circumstances determine that it was a crime and also who it was committed it. It is not necessary that the crime be brought home to the accused to an absolute certainty. Doubts arising from the testimony may exist, yet, unless it is what is denominated a reasonable doubt, a conviction may lawfully follow. There is nothing more sacred about a lode or the knowledge of a lode than there is about human life. Whatever fact is necessary to be established may be established by circumstances. And in no civil action is it necessary to establish any disputed fact beyond a reasonable doubt—it is always sufficient that it be proved by a preponderance of the testimony. All the testimony being in, if there is any, tending to prove the facts in dispute, that testimony is submitted to the jury and upon the jury devolves the duty of declaring one way or the other upon it. It seems that the testimony suggested in the query must be competent as tending to prove the existence of a vein or lode within a placer claim, the weight and efficacy of the testimony for the purpose depending upon the nearness of the proved facts to the main fact in dispute.

VII.

Whether there was any legal evidence for the jury of the vein or lode claimed by the defendant in error in the first two cases, Nos. 6 and 7, or by the plaintiff in error in the third case, No. 16.

No unimportant matter in connection with the above query is the fact that neither Moyer nor W. H. Stevens, nor any other person, testified for the plaintiff to contradict a single fact proved by the defendant relating to the veins or lodes.

If this Court takes cognizance of its own records, it will find that in the half dozen or more cases in which the question of the knowledge of Stevens or Moyer, or of some one of the persons Stevens obtained to locate placer claims for him, which immediately upon issue of patent were deeded to the Iron Silver Mining Company, not one of them ever ventured upon the witness stand to contradict the evidence showing their knowledge. This is a most remarkable fact. Here have been case after case, involving property of great value. The principal question involved was the knowledge or ignorance of Mr. Stevens or of the placer locators who did the work for him about the lode beneath the surface Not one of them ever dared go upon the stand to contradict a word of evidence showing their knowledge. They must have known that a cross-examination would have settled the case against them; hence they did not venture. This was so in every Iron-Silver Mining Company case brought into this court, and their name now is legion.

The testimony of Leonhardy is certainly pertinent and suggestive. Bearing in mind that the lode is a blanket lode; that it underlies a great area of the Leadville district; that it underlies all the lode and placer claims of the Iron Silver Company, of which Stevens was the projeni-

tor, it can not but tend to show that as early as the spring of 1877 before, Mr. Stevens knew of the lode. Leonhardy says: [Folios 77 and 79.]

In the spring of '77 Mr. Stevens came out to my house, and he had brought out a great many men from Detroit to work for him in California gulch, in that vicinity, and he stopped there over night; and while he was there he spoke very illy of the country; said the country wasn't worth anything. I finally told him that I thought his actions belied his words. He wanted to know why. "Why," said I, "you are bringing out here three or four hundred men, paying their expenses out here, and I know you are sharp enough not to lay out money that way unless you are going to have some returns for it." He didn't say anything more until after breakfast. He told his men to get ready and go into the road and they went out. Some were in the house and some were in the ambulance; he told them to hitch the horses in the ambulance and get ready, and he followed them out of doors; and he came back and he shut the door, and he told me he had staid there to have a long talk with me, and he said: "You may think it queer the way I am acting. The country is good—the best mineral country I ever saw—but if I told the men so they would leave me as soon as they got up there and go on their own hook." Then he told me he had been there since '76 and what the result was and what he had expended. *He had sunk several locations, a great many,* built houses, and expended some $30,000. *Now, he had found an immense body of mineral underlying all that ground there; that he had shipped a great many tons;* that they had netted him so much, the figures I forget, but they had paid him a handsome profit; *that he was going up there to secure the ground and begin very heavy operations shipping ore.*

* * * * * *

"Well, I should think a week or two afterward, he got into trouble up there, and he concluded that the atmosphere was better down below at my house than it was up there. He came down, said they had treated him very badly up there, the miners; that they were *afraid he was going to gobble up the whole country, "but if I can not do it in one way I will do it in another."*

He said, "I have spent more money up there than anybody else, and I am entitled to the ground."

Q. State what, if anything, he said upon either of these occasions his object to be in taking up large areas of territory.

A. So as to secure the mineral there was on it.

Q. What kind of mineral?

A. Carbonate mineral they were shipping there at that time.

Q. In place?

A. In place.

Upon cross-examination the following occurred:

Q. Did he say anything about having an outcrop?

A. He simply told me he had prospected that country and had found a great deal of mineral there throughout; *it was underlying the whole country.*

This same witness [folios 69-76], having shown that he was familiar with the the territory in dispute since 1863, in answer to the following question, "State if you know of any lode locations or claims adjoining the William Moyer placer claim, and, if so, when you first knew of their existence?" stated that he knew of a great many holes having been sunk there between 1860 and 1870 or 1880, and he mentioned as of the earlier days the "Pennsylvania," "5-20," and "1860" claims, and told who they were worked by.

Also of the "Oro La Plata" in 1876, it being a part of the William Moyer placer claim, of seeing mineral on the

dump; also of the "Pennsylvania" in 1872, right adjoining the placer, he examined the underground workings of it, found the ore in place; also of the "Rock" and "Dome" claims, since 1868, adjoining the placer; was in the workings in 1877, found a big body of carbonates, they run in the direction of the placer. In speaking of carbonates and mineral, he meant ores carrying lead, silver, and gold. He also testified that not more than 7 per cent. of the Moyer placer claim was placer ground.

The testimony of this witness was taken by deposition. Plaintiff could not plead ignorance of it before trial, yet the man or men who could contradict it if every word was not the truth, were not called, thus leaving it before the jury, as it was in fact, the absolute, unquestioned truth.

Now about the veins or lodes in the tunnel:

The tunnel was run in the spring of 1877. The veins were cut in it in February, 1877. This was probably before any placer claim was located upon the ground. It is quite reasonable to suppose that if the placer was located, Hayes and his partners would not have been permitted to go within its lines to run a tunnel. The tunnel is wholly within the placer claim.

Now we have Moyer locating a placer claim, and including a tunnel either constructed or under way within it, and within this tunnel the lodes were disclosed. Mr. Hayes testifies that the tunnel was open to the world to examine at any time. This fact was one fairly to be considered by the jury, and the argument was a reasonable one that, finding a tunnel within a placer claim they were locating, they would examine it, and, therefore, must have seen the lode that was there disclosed.

But this is not all. Upon March 10, 1879, Hayes and his brother, and George C. Gardner and R. E. Goodell, filed location certificates for lode claims covering the lodes disclosed in the tunnel. The Gardner location certificate

was introduced by plaintiff. [Folios 59 and 60.] It discloses that the lode was located February 1, 1879. [See last line of the certificate.]

"Located" has a popular and a technical meaning with miners. Both meanings are the same. It is something done by the prospector after a lode has been discovered. It is the "location" of the lode. The statutes of Colorado tell how a lode shall be located.

The period of ninety days after discovery is allowed to perfect a location—1st, a discovery stake must be planted near the point of discovery, with inscriptions upon it; then the claim must be surveyed and staked upon the surface—marked with six substantial stakes, one at each corner and one at the centre of each side line, hewn on the face towards the centre of the claim; then a shaft must be sunk, or a cut or tunnel run to the lode. When this is all done the lode is located, except that the location certificate must be made out and filed for record. This is the last thing done. It is the formal recording of the claim. So, on and before February 1, 1879, the lodes had not only been disclosed in the tunnel, but the claims had been staked or marked upon the surface of the ground as the law required. This was twenty days before the placer claim was entered and paid for.

Then, as to the lodes within the tunnel:

Under the statutes of Colorado the mere existence of a tunnel which the placer owners did not run should have put them on inquiry as to what was disclosed in it.

The States and Territories may make local rules and regulations not in conflict with the laws of the United States concerning the discovery of lodes and their location. The "shaft" is the more usual method of developing the lode for location. A shaft sunk ten feet "from the lowest part of the run at the surface" is what Colorado statutes require; but they also provide [Section 2403, Re-

vised Statutes of Colorado, 1883] that "any open cut, cross cut, or *tunnel* which shall cut a lode ten feet below the surface shall hold the lode the same as if a discovery shaft had been sunk,"

Now, on this Moyer placer was a tunnel 400 feet long; it had been run in the spring of 1877; ten veins in it were cut in February, 1877. Moyer found this tunnel on the ground, when he located the placer claim so as to include it. The statute makes a tunnel as effective to hold a lode to the discoverer as does a discovery shaft. If Moyer entered the tunnel, and it is the quintesence of credulity to believe that he did not, he must have known of the existence of the lodes cut by it, for the uncontradicted testimony is that two lodes were cut in the running of the tunnel. This knowledge must have come to him even before the placer claim was located, and one and one-half years before the application for a patent was filed.

Then, again, to illustrate the significance of a tunnel existing upon ground either at the time of location of the claim, or of a survey that must be preliminary to an application for a patent:

Section 2323 of the U. S. Revs. Stats. provides that "where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface."

"The face of the tunnel" is held to be that point where the tunnel in its excavation first enters beneath the surface.

With this section of the Federal statutes staring the locators of the placer claim in the face, is it not incredible that before location or application for a patent they should

not have examined the tunnel to learn whether or not lodes or veins had been discovered in it?

Now, as to the veins or lodes in the tunnel:

Charles C. Baldwin testified [folios 82–87] he knew the Goodell and Gardner claims; he had examined the workings; had examined the Mike tunnel; that there were several veins or lodes disclosed in the course of the tunnel, and he pointed out on the maps where they were. He said: "*I consider it a well-defined vein of rock in place.*"

The same witness testified fully to the great underlying lode of that section of the country, and that it existed under the Moyer placer; also, that no placer mining ever occurred on the Moyer placer.

Michael C. Norris testified [folios 87–95] particularly about a conversation with William H. Stevens about the Wells and Moyer placer. This latter placer adjoined the Moyer placer. Both placers were conveyed to the plaintiff company, but first to Mr. Stevens, for whom title was, in fact, procured.

Though the witness testified in chief that the conversation he had with Mr. Stevens was about the Moyer placer, upon cross-examination it was shown that he meant the Wells and Moyer—the adjoining placer. Whichever he meant, the conversation is important as tending to show the knowledge that Stevens had of the lode that underlies that entire section. The following is from his testimony:

Q. Do you know William Moyer, the patentee of the Moyer placer?

A. Yes, sir.

Q. Did you have any conversation with him concerning his knowledge of the lode under that placer?

A. Well, yes.

Q. What did he say?

A. He told me he was going to get a patent on it for Mr. Stevens; I mean a placer patent.

Q. Well, did you have any talk with him about it?

A. Yes.

Q. State what conversation you had with him.

A. I had a lode claim there myself; the Thomas Francis Meagher it was called. He told me the placer would only go down to the bed rock, and it wouldn't interfere with me at all.

* * * * * *

Q. What other statement, if any, did Moyer make about Stevens' connection with it besides that he was getting it for Stevens?

A. He said he was afraid the miners would adverse him, and he wanted Moyer to get it. He told me Stevens would pay for it and it would cost him nothing.

Upon cross-examination the witness stated that the vein in the tunnel had iron in it;, that it was iron.

Point is made on this that it was only a vein of iron—a mere insignificant matter not worthy of consideration.

But, as has been stated before, even experts often could not tell whether vein material contained gold or silver until analysis. Iron was the dominating metal of the Leadville veins in those days. The silver and gold were found in close alliance with it. Consider the significance of the name of the plaintiff company—"The IRON Silver Mining Company." It was the fact that the ore of that section was what is denominated "iron carbonates," in which silver was found that gave the name to the plaintiff company. The witness calls it iron because, having made no assays, he couldn't say whether it contained gold or silver or not, so he did what prudent men would always do under like circumstances, called it that which the facts known to him would warrant—a well defined vein or lode in rock in place—a vein of iron. It would require assays

to positively determine whether it carried silver or gold or not.

Fred G. Bulkley [folios 105-116] also testified. He was a civil and mining engineer. He made the maps used on the trial. He describes the vein—the Gardner vein—cut 78 feet in the tunnel, as follows: "At that point, with porphyry on either side of it—that is, towards the east and towards the west—a crevice dips into the hill at an angle of 60 degrees, 30 minutes. The crevice is from 12 to 18 inches wide. The wall upon the westerly side is smooth. The vein has a dip—the crevice has a dip of 60 degrees, 30 minutes into the mountain towards the east. Lying upon the footwall there is a streak of clay which is perfectly continuous so far as developments show. That clay is from an inch to 6 inches thick. It is hard, leathery clay, and one can catch hold of a projecting portion and pull it down as one would the bark of a tree. It is hard and tough. Next that is a mixed mass of iron-stained porphyry and clay, the iron having a thickness of from 8 to 12 or 14 inches. Next to that is a band of iron at a thickness of from 2 to 6 or 8 inches. I have a specimen of that material with me which I took from the vein. (Hands it to the jury.) This is the nature of the material."

The witness then described the second vein found—the vein upon which the Goodell claim was located.

He further testified about the great underlying vein and that it extended under the Moyer placer.

On cross-examination the witness said:

"I havn't described it as a vein. In speaking of it I used the term inadvertently once, because while it possesses such characteristics of a vein, as will be determined upon inspection, other necessary characteristics, I think, would have to be determined by analysis. For instance, it has the general indication of lateral extent and extent

in depth; that is, it has a very considerable lateral ex tent in the direction of the strike and dip. The material which is inclosed in it—I have brought a piece of it with me—looks very much as though it would carry silver and possibly some gold, but to speak positively upon that point is more than I can do. I venture to say it looks like it, and most any miner will agree with me."

Again, upon redirect examination, he stated that the vein in the tunnel almost positively had connection with the great underlying vein.

Now, no miner can read this description of this crevice and its contents without being convinced that it is a lode or vein within the meaning of the Statute. The witness hesitated to call it a lode because, as he stated, he could not be positive that it carried gold or silver without analysis. But it looked as though it did, and, as he said, almost any miner would agree with him. There was the crevice, the clay seam or slicken-sides common to veins, the rocky contents, the iron and iron-stained material, the width of the crevice quite large, indeed—the only things undetermined in the mind of the witness was the extent of the crevice in depth and longitudinally, and positively whether or not it carried gold and silver.

But, giving it as his opinion that it did carry the precious metals, he did what was very important in the case, *he produced to the jury a sample taken from the fissure. This was inspected by them.* Who can tell what influence that had upon their minds. The jury had a portion of the identical vein filling, which, as is often the case, may have spoken louder to them than words.

Then we have the testimony of John Hayes. [Folios 95-105.] He, among other things, worked on the Mike lode since 1874. He run the Mike tunnel that is now in the Moyer placer. He run it 400 feet—commenced it in

a snow-storm. The following questions and answers appear in the record:

Q. Did you discover in that Mike tunnel any veins?

A. I did discover a vein in that Mike tunnel. I struck the pick into it myself.

Q. When?

A. We discovered it about the 15th or 16th of February, 1877.

Q. Now, how much of a vein was that? Describe it.

A. Well, it was about eighteen inches wide.

Q. Describe the vein as to the walls and the sides of it, and what was in it.

A. Well, it was two porphyry walls; was with the vein. It was decomposed part and a clay and vein matter, and I don't know if I could describe the vein better than that much. * * * I got several colors of gold in it, and my brother was the territorial assayer of Colorado at that time—he's is dead now, and he had it assayed several times, and he got from *a trace to three-quarters of an ounce of gold in it.*

Q. When was that? Who panned it?

A. That was in 1877; we started that tunnel the 13th day of January, 1877, and we worked on it right along, night and day, until the 24th of April, 1877.

The witness then describes the remaining veins found in the tunnel.

He also describes the staking of the claims, on the surface of the ground, in 1877-'78, before the date of the certificates.

He also expressed his opinion that the veins were feeders and connected with the main underlying vein. Also that he allowed everybody in the tunnel. Also that the owners have done $100 worth every year on these lode claims since they were located.

Now here is a mass of testimony that went to the jury,

all, not only tending to prove, but actually proving the existence of a lode or vein within the meaning of the Statutes.

Plaintiff claims it is a poor vein. The claim is not well founded. Three-quarters of an ounce of gold to the ton is of the value of $15. A lode that runs so much is often worth hundreds of thousands of dollars, the only question being the extent of the ore. The celebrated Father de Smet mine at Deadwood produces ore that runs less than $5 to the ton, yet it is of immense value, because the quantity of this low grade ore is great. The ore is mined and the gold extracted at about $2 per ton, leaving a net profit of $2 to $3 per ton on the material. Scores of such instances may be cited.

Defendant in error confidently submits that here was a great mass of testimony, every word of it competent, not a syllable of it contradicted, that went to establish, not only the existence of the great underlying vein, but also of unquestioned veins or lodes in the Mike tunnel, and also that they were known lodes within the meaning of the law. The very material of the lode was produced before the jury and they had that to examine in reaching a verdict.

The court submitted all of this to the jury and left it for them to say whether it was a lode or vein, and whether it was a known lode or vein.

Not only that, but the court required the jury to find that it was a located lode or vein before their verdict could be for the defendant. The court fixed the time of knowledge to effect the plaintiff before the entry and payment of the placer claim.

The proof shows, and it is wholly uncontradicted, that the knowledge existed long before application for patent was made.